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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION

ABBOTT LABORATORIES, *et al.*,

Petitioners,

—v.—

ROBERT A. HUGGINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GEOFFREY C. HAZARD, JR.
Of Counsel
Trustee Professor of Law
University of Pennsylvania
3400 Chestnut Street
Philadelphia, Pennsylvania 19104
(215) 898-7494

KENNETH R. LOGAN
Counsel of Record
SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

Attorneys for American Home Products Corporation and American Cyanamid Company

(Additional Petitioners And Counsel Are Listed On The Signature Pages)

173 pp

QUESTION PRESENTED

Whether under *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981), and the artful pleading doctrine, a complaint raises a federal question where (i) plaintiff's state court action is an attempt to circumvent a prior preclusive federal court ruling, and (ii) the facts alleged are copied from multiple pending federal cases and the only claim encompassed by them is federal in nature.

PARTIES TO THE PROCEEDING

The named plaintiff in the federal putative class action, *Huggins v. Abbott Laboratories, et al.*, No. 96 C 4323 (N.D. Ill.), is Robert A. Huggins. The defendants named in the complaint are Abbott Laboratories, American Cyanamid Company, American Home Products Corporation, Bristol-Myers Squibb Company, Burroughs Wellcome Company, Carter-Wallace, Inc., Ciba-Geigy Corporation, DuPont Merck Pharmaceuticals Company, Eli Lilly and Company, Forest Laboratories, Inc., G.D. Searle & Company, Glaxo, Inc., Marion Merrell Dow, Inc., Merck & Company, Inc., Ortho Pharmaceuticals Corporation, Pfizer, Inc., Rhone-Poulenc Rorer Pharmaceuticals, Inc., Sandoz Pharmaceuticals Corporation, Schering-Plough Corporation, SmithKline Beecham Corporation, The Upjohn Company, Warner-Lambert Company, and Zeneca, Inc.

Petitioners Burroughs-Wellcome Company and Glaxo, Inc. have merged to become Glaxo Wellcome, Inc. Petitioner Sandoz Pharmaceuticals Corporation has merged with the pharmaceutical business and assets of Petitioner Ciba-Geigy Corporation to become Novartis Pharmaceuticals Corporation. Petitioner Marion Merrell Dow, Inc. is now known as Hoechst Marion Roussel, Inc. Petitioner The Upjohn Company is now known as Pharmacia & Upjohn Company. All claims against defendant DuPont Merck Pharmaceuticals Company have been dismissed.

RULE 29.6 STATEMENT

Pursuant to Sup. Ct. R. 29.6, the following are Petitioners' parent and nonwholly owned subsidiary companies:

(1) Abbott Laboratories has no parent company. The nonwholly owned subsidiaries of Abbott Laboratories are TAP Holdings, Inc., and TAP Pharmaceuticals, Inc.;

(2) American Home Products Corporation has no parent company. The nonwholly owned subsidiaries of American Home Products Corporation are Immunex Corporation, International Home Foods, Inc., Cyanamid India Limited, Geoffrey Manners & Company, Limited, Nippon Sherwood Medical Industries Limited, and Wyeth Laboratories Limited;

(3) The parent company of Petitioner American Cyanamid Company is Petitioner American Home Products Corporation. American Cyanamid Company has no nonwholly owned subsidiaries;

(4) Bristol-Myers Squibb Company has no parent company. The nonwholly owned subsidiaries of Bristol-Myers Squibb Company are Bristol-Myers Lion Limited, Bristol-Myers Squibb G.M.B.H., Mead Johnson (Guangzhou) Limited, P.T. Squibb Indonesia, Sino-American Shanghai Squibb Pharmaceuticals Limited, Squibb (Nigeria) Limited, 2309 Realty Corporation, and Pharmavit Rt.;

(5) Carter-Wallace, Inc. has no parent or nonwholly owned subsidiary companies;

(6) The pharmaceutical business and assets of Petitioner Ciba-Geigy Corporation have been merged with Petitioner Sandoz Pharmaceuticals Corporation and has been renamed Novartis Pharmaceuticals Corporation. The parent corporations of Novartis Pharmaceuticals Corporation are Novartis Finance Corporation, Novartis

Corporation, and Novartis AG. The nonwholly owned subsidiaries are Novartis Biotech Partnership, Inc. and Chiron Corporation;

(7) Eli Lilly and Company has no parent company. The nonwholly owned subsidiaries of Eli Lilly and Company are Lilly Ranbaxy Pharmaceuticals LLC, CBI Uniforms, Inc., IMS-NET of Arizona Joint Venture Limited, Illinois Medical Information Network, Inc., IMS-NET of Arkansas, Inc., IMS-NET of Central Florida, Inc., Indiana Medical Communication Network LLC, Minnesota Medical Communication Network LLC, AZA Research Pty. Limited, Belarsdorf-Lilly GmbH, Ranbaxy Lilly Company, Eli Lilly Suzhou Pharmaceutical Company Limited, Eli Lilly Egypt, Alkan Pharma S.A.E., Pharmaserve-Lilly S.A.C.I., Pharmabrand, S.A.C.I., PRAXICO Limited, Eli Lilly Ranbaxy Limited, Daewong Lilly Pharmaceutical Co., Limited, Damsen Trading Limited, Damsem Trading Limited - Branch, Eurobase B.V., Eli Lilly-Gohar (Private) Limited, Lilly Grodzisk Sp, Z.o.o., Vitadia Pharma Sp. Z.o.o., ELVA Joint Laboratory, Lilly-NUS Centre for Clinical Pharmacology Plc. Limited, Glaxo/Eli Lilly Partnership, The Medikredlt Joint Venture Partnership, and Medikredit Pty. Limited;

(8) Forest Laboratories Inc. has no parent or nonwholly owned subsidiary companies;

(9) The parent corporation of G.D. Searle is Monsanto Company. G.D. Searle has no nonwholly owned subsidiaries;

(10) Glaxo Wellcome, Inc. was formed as a result of the merger between two of the Petitioners, Glaxo, Inc. and Burroughs Wellcome Company. The parent corporation of Glaxo Wellcome, Inc. is Glaxo Wellcome, plc. Glaxo Wellcome Inc. has no nonwholly owned subsidiaries;

(11) The parent corporations of Hoechst Marion Roussel, Inc. (formerly Marion Merrell Dow, Inc.) are Hoechst AG, Hoechst Marion Roussel AG, HMR Pharma, Inc., and Hoechst Marion Roussel S.A. The nonwholly owned subsidiaries of Hoechst Marion Roussel, Inc. are Hoechst Marion Roussel Canada, Inc., Carderm Capital L.P., Marion Merrell et Cie (SNC), Marion Merrell Bourgoin S.A., Hoechst Marion Roussel S.p.A., Biosearch Italia S.p.A., Gruppo Lepetit S.p.A., Hoechst Marion Roussel S.A. (Belgium), Hoechst Marion Roussel S.A. (Spain), Marion Merrell S.A. (Spain), and Marion Merrell S.A. (France);

(12) Merck & Co., Inc. has no parent or nonwholly owned subsidiary company;

(13) Ortho Pharmaceutical Corporation is now known as Ortho-McNeil Pharmaceutical Corporation, which is a wholly owned subsidiary of Johnson & Johnson. Johnson & Johnson has no parent or nonwholly owned subsidiary companies.

(14) Pfizer Inc. has no parent company. The nonwholly owned subsidiaries of Pfizer Inc. are Neurogen, Cyberonics, Cantab Pharmaceuticals, plc, Incyte Pharmaceuticals, Inhale Therapeutic, Microcide Pharmaceutic, Spectranetics, Ligand Pharmaceuticals, and Theratech;

(15) The parent corporation of Rhone-Poulenc Rorer Pharmaceuticals, Inc. is Rhone Poulenc S.A. Rhone-Poulenc Rorer Pharmaceuticals has no nonwholly owned subsidiaries;

(16) Schering-Plough Corporation has no parent company. The nonwholly owned subsidiaries of Schering-Plough Corporation or Schering Corporation (the wholly owned subsidiary of Schering-Plough Corporation) are Schering-Plough Indonesia, Fulford (India), Essex Pharma S.A. (Greece), Schering-Plough Pharmaceutical (China), Essex Quimica Industria E Comerico S.A.

(Brazil), Industria Quimica E Farmaceutica Schering-Plough S.A. (Brazil), Syntro Zeon, LLC;

(17) The parent corporations of SmithKline Beecham Corporation are SmithKline Beecham, p.l.c., SmithKline Beecham Overseas, Limited, and Setfirst, Limited. The nonwholly owned subsidiaries of SmithKline Beecham are Smith Kline & French Pakistan, Limited, Franklintown Corporation, SmithKline Beecham Consumer Healthcare, L.P.; and Beecham Enterprises, Inc. (subsidiary of SmithKline Beecham Consumer Healthcare, L.P.);

(18) The parent corporation of Pharmacia & Upjohn Company (formerly The Upjohn Company) is Pharmacia & Upjohn, Inc. The nonwholly owned subsidiaries of Pharmacia & Upjohn Company are Upjohn Suzhou Animal Health Products Company Limited (China), Upjohn Suzhou Pharmaceutical Company Limited (China), Sino-Swed Pharmaceutical Corp. (China), Pharmacia Limited (China), Pharmacia (China) Biotech Limited, Pharmacia (Hong Kong) Biotech Limited, P.T. Pharmacia & Upjohn Indonesia, Nuova ICC-Upjohn SpA (Italy), Korea Upjohn Limited, Pharmacia & Upjohn Allergon AB (Sweden), PharmaFrac AB (Sweden), Pharmacia & Upjohn, Inc., Yusafarm d.o.o. (Fed. Rep. of Yugoslavia);

(19) Warner-Lambert has no parent company. The nonwholly owned subsidiaries of Warner-Lambert are Suzhou Capsugel Limited, Warner Lambert (Guangzhou) Ltd., International Company for Gum and Confectionary (INCOGUM) S.A.E., P.T. Warner Lambert Indonesia, Parke Davis (India) Limited, Parke-Davis/Elan Ltd., Meito Adams Company, Limited, Warner Lambert (Nigeria) Limited, Parke, Davis & Co. Limited, Warner-Lambert (Tanzania) Limited, International Capsule Company, Limited, O.C.T. (Thailand) Limited, Warner-Lambert Gida Pazarlama A.S., Ewl Eczacibasi Warner-Lambert

Ilac Sanayi ve Tieareta A.F., Elan Pharma Limited, and Laboratorios Substantia C.A.;

(20) The parent corporations of Zeneca, Inc. are Zeneca Holdings, Inc., Zeneca Limited, Zeneca Group PLC. The nonwholly owned subsidiaries of Zeneca, Inc. are Corpus Christi Globals Chemical Company and Image Polymers Company.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT iii

TABLE OF APPENDICES x

TABLE OF AUTHORITIES xii

OPINIONS AND JUDGMENTS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. This Case Mirrors A Previously Filed Case That Was Extensively Litigated In Federal Court 4

B. The District Court Found The Real Nature Of This Case To Be Federal 7

C. The Seventh Circuit Rejected The District Court's Finding And Minimized The Importance Of *Moitie* 8

PAGE

REASONS FOR GRANTING THE PETITION 9

A. *Rivet* Alone Fails To Present This Court With Facts Sufficient To Enable It To Clarify The Artful Pleading Doctrine 9

B. Certiorari Should Be Granted In Order To Reaffirm The Well-Founded Protections Afforded By *Moitie* And The Artful Pleading Doctrine 12

C. Certiorari Should Be Granted To Dispel The Seventh Circuit's Suggestion That *Moitie* Means Nothing 15

1. Under *Moitie*, The District Court Could Properly Assert Jurisdiction On Removal To Prevent Evasion Of Its Prior, Preclusive Ruling 16

2. Respondent's Complaint, Which Tracks Existing Federal Complaints And Lacks Any Basis In State Law, Presents An Artfully Pled Federal Claim 19

CONCLUSION 24

TABLE OF APPENDICES

		PAGE
Appendix A	Opinion of the United States Court of Appeals for the Seventh Circuit	1a
Appendix B	Order of the United States Court of Appeals for the Seventh Circuit Denying Motion to Stay Mandate Pending Application for Certiorari	30a
Appendix C	Order of the United States Court of Appeals for the Seventh Circuit Granting Permission to Appeal.....	32a
Appendix D	December 16, 1996 Order of the United States District Court for the Northern District of Illinois	34a
Appendix E	October 1, 1996 Order of the United States District Court for the Northern District of Illinois	45a
Appendix F	Transfer Order of the Judicial Panel on Multidistrict Litigation.....	60a
Appendix G	March 22, 1996 Order of the United States District Court for the Southern District of Alabama.....	62a
Appendix H	January 30, 1996 Order of the Circuit Court of Clarke County, Alabama	64a

		PAGE
Appendix I	Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing	66a
Appendix J	Alabama Antitrust Statute, Ala. Code § 6-5-60.....	68a
Appendix K	Selected Provisions of the United States Code	69a
Appendix L	*Huggins v. Abbott Laboratories, et al.* Class Action Complaint	73a
Appendix M	*Price v. American Home Products Corp., et al.* Class Action Complaint	98a
Appendix N	August 10, 1995 Opinion of the United States District Court Northern District of Illinois in *Price v. American Home Products Corp, et al.*	107a
Appendix O	February 7, 1995 Opinion of the United States District Court Northern District of Illinois in *Price v. American Home Products Corp., et al.*.....	112a
Appendix P	November 15, 1994 Opinion of the United States District Court Northern District of Illinois in *Price v. American Home Products Corp., et al.*.....	117a

TABLE OF AUTHORITIES

Cases: PAGE

Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464 (1947) 2

Aetna Casualty & Surety Co. v. Jeppeson & Co., 440 F. Supp. 394 (D. Nev. 1977)..... 18

Alexander v. Chicago Park Dist., 773 F.2d 850 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986)... 18

Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968) 18

Baccus v. Parrish, 45 F.3d 958 (5th Cir. 1995)..... 19

Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983) 18

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 15

Deauville Assoc., Inc. v. Lojoy Corp., 181 F.2d 5 (5th Cir.), *cert. denied*, 340 U.S. 905 (1950)..... 19

Durrett v. Upjohn, No. CV 94-029-G (Cir. Ct. Greene Cty. December 12, 1996), *appeal pending*, No. 1960464 (Ala.) 20

Federated Department Stores v. Moitie, 452 U.S. 394 (1981) ..... *passim*

Georgia Fruit Exchange v. Turnipseed, 9 Ala. App. 123, 62 So. 542 (Ala. Ct. App. 1913) 20

In re Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 1995 WL 495937 (N.D. Ill. Aug. 10, 1995) 6

PAGE

In re Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 1994 WL 663590 (N.D. Ill. Nov. 15, 1994) 6

In re Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 1995 WL 56615 (N.D. Ill. Feb. 7, 1995) 6

In re Dalkan Shield Punitive Damages Litigation, 613 F. Supp. 1112 (E.D. Va. 1985) 18

In re NASDAQ Market Makers Antitrust Litig., 929 F. Supp. 174 (S.D.N.Y. 1996) 23

In re Piper Aircraft Distribution System Antitrust Litig., 551 F.2d 213 (8th Cir. 1977)..... 13, 14, 18

In re Wiring Device Antitrust Litig., 498 F. Supp. 79 (E.D.N.Y. 1980) 11, 16, 20, 21, 23

J.R. Clearwater Inc. v. Ashland Chemicals Co., 93 F.3d 176 (6th Cir. 1996) 15

Kahn v. Salomon Bros. Inc., 813 F. Supp. 191 (E.D.N.Y. 1993)..... 23

Lee's Prescription Shops, Inc. v. Chas. Pfizer & Co., Inc., 1970 Trade Cases ¶73,180, 1970 WL 504 (S.D.N.Y. 1970)..... 14

Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962) 18

Mechanical Rubber & Supply Co. v. American Saw & Mfg. Co., 747 F. Supp. 1292 (C.D. Ill.), *modified on other grounds*, 810 F. Supp. 986 (C.D. Ill. 1990) 23

PAGE

Prospect Dairy, Inc. v. Dellwood Dairy Co., 237 F. Supp. 176 (N.D.N.Y. 1964) 16

Rivet v. Regions Bank of Louisiana, F.S.B., 108 F.3d 576 (5th Cir.), *cert. granted*, No. 96-1971 (September 29, 1997) ..... *passim*

Seven-Up Bottling Co. v. Archer-Daniels Midland Co., No. CV 95-43680 (Cir. Ct. Walker Cty. October 31, 1996), *appeal pending*, No. 1960220 (Ala)... 20

Sullivan v. First Affiliated Securities, Inc., 813 F.2d 1368 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987) 11

Three J. Farms v. Alton Box Bd. Co., Civ. No. 78-1257, 1978 WL 1459 (D.S.C. Nov. 29, 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980)..... 11, 16, 21, 23

Travelers Indemnity Co. v. Sarkisian, 794 F.2d 754 (2d. Cir.), *cert. denied*, 474 U.S. 889 (1986) 10, 11

Villareal v. Brown Express, Inc., 529 F.2d 1219 (5th Cir. 1976) 19

Zdonok v. Glidden Co., Durkee Famous Food Div., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964) 18

Statutes:

15 U.S.C. § 1 ..... 2, 4

28 U.S.C. § 1254 2

28 U.S.C. § 1292 ..... 2, 8

28 U.S.C. § 1331 ..... 2, 5

PAGE

28 U.S.C. § 1332 ..... 2, 5

28 U.S.C. § 1337 2

28 U.S.C. § 1441 ..... 2, 5

28 U.S.C. § 2283 2

Ala. Code § 6-5-60 ..... 2, 5

Fed. R. Civ. P. 23 ..... 4, 6

Other Authorities:

C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure (1976) 15

Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. Rev. 514 (1996) 12

Robert A. Ragazzo, *Reconsidering The Artful Pleading Doctrine*, 44 Hastings L.J. 273 (1993) 12

IN THE

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OCTOBER TERM, 1997

No. 97-____

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION

ABBOTT LABORATORIES, *et al.*,

Petitioners,

—v.—

ROBERT A. HUGGINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Abbott Laboratories, *et al.* respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this matter on August 15, 1997.

OPINIONS AND JUDGMENTS BELOW

The Opinion and Judgment of the three-judge panel of the United States Court of Appeals for the Seventh Circuit, entered August 15, 1997, *see* Appendix ("App.") 1a-29a, is reported at 123 F.3d 599. The Order of the United States District Court for the Northern District of Illinois denying

Respondent's motion to remand this case to Alabama state court, entered October 1, 1996, *see* App. 45a-59a, is reported on Westlaw at 1996 WL 568793. The Order of the United States District Court for the Northern District of Illinois granting Respondent's motion to certify the district court's October 1, 1996 Order for interlocutory appeal, entered December 16, 1996, *see* App. 34a-44a, is reported on Westlaw at 1996 WL 732834.

STATEMENT OF JURISDICTION

This case originated in the Alabama state courts and was timely removed by Petitioners pursuant to 28 U.S.C. § 1441. The United States District Court for the Northern District of Illinois denied Respondent's motion for remand, finding that jurisdiction was present pursuant to 28 U.S.C. §§ 1331 and 1332. Jurisdiction was also present pursuant to 28 U.S.C. § 1337. The Court of Appeals exercised jurisdiction pursuant to 28 U.S.C. § 1292(b). The Court of Appeals entered its judgment on August 15, 1997, and denied a timely filed petition for rehearing on October 8, 1997. On October 20, 1997, the Court of Appeals denied Petitioners' motion to stay the mandate pending application for certiorari.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Ala. Code § 6-5-60, which is set forth in the Appendix at 68a. This case also involves the following provisions of the United States Code: 15 U.S.C. § 1 and 28 U.S.C. §§ 1331, 1337, 1441, and 2283, which are set forth in the Appendix at 69a-72a.

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[1] Neither the issuance of the mandate in this case nor the eventual return of the case to the Alabama state courts deprives this Court of jurisdiction. *See Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 466-67 (1947).

STATEMENT OF THE CASE

Under this Court's application of the artful pleading doctrine in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981), a federal court may, under certain circumstances, protect its jurisdiction by looking beyond the plain allegations of a complaint to uncover the true basis of a plaintiff's claim. While this doctrine, which limits a plaintiff's ability to elude artfully a preclusive ruling of a federal court, is well grounded in principles of federalism, the Seventh Circuit in this case all but ignored application of the doctrine, thus permitting the Respondent here a "second bite at the apple." Nonetheless, courts have not uniformly applied the doctrine and this Court's recent grant of the petition for certiorari in *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576 (5th Cir.), *cert. granted*, No. 96-1971 (September 29, 1997), demonstrates its recognition of the importance of clarifying *Moitie* and the artful pleading doctrine. However, although *Rivet* and this case both involve the artful pleading doctrine as applied in *Moitie*, there are significant differences between the two cases and disposition of *Rivet*, while clearly relevant to a proper analysis of this case, will not necessarily resolve the issues that are at the core of either this case or the artful pleading doctrine itself. Petitioners therefore respectfully suggest that certiorari be granted here to allow this Court to consider the facts of this case in conjunction with the Court's analysis of the Fifth Circuit's decision in *Rivet*. At the very least, a grant of certiorari is appropriate here so that this Court can vacate the judgment below and remand the case to the Seventh Circuit for further consideration in light of *Rivet*.

The *Moitie* issue at stake in *Rivet* is limited to the proper application of the artful pleading doctrine where a plaintiff attempts to bring a lawsuit in state court despite the fact that the claim is barred by the *res judicata* effect of a prior federal bankruptcy court judgment. In this case, however, it is not a federal judgment that plaintiff has sought to avoid by filing a

state court action but rather an intensely-litigated prior federal preclusive ruling regarding class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Quite simply, this case is part of a continuing effort by a collection of class plaintiffs' lawyers to forum shop their case until they are able to find a judge who is willing to disregard the Northern District of Illinois' three-year-old ruling that class certification is inappropriate in this case. Moreover and unlike *Rivet*, the artful pleading doctrine is applicable here for an additional reason: the plaintiff artfully crafted a Complaint so as to avoid any mention of federal law despite the facts that (a) the Complaint copies those in multiple federal cases in a coordinated MDL proceeding, and (b) the only claims possibly covered by the Complaint's allegations are federal in nature because of the limited scope of the Alabama antitrust statute on which plaintiff purports to rest his claims. This separate and independent branch of the artful pleading doctrine, while recognized by the *Moitie* Court and the case law on which it expressly relied, is nowhere addressed by the *Rivet* case.

A. This Case Mirrors A Previously Filed Case That Was Extensively Litigated In Federal Court

This case concerns a Complaint initially filed in Alabama state court and subsequently removed to federal court, where it was assigned by the Judicial Panel on Multidistrict Litigation to United States District Court Judge Charles P. Kocoras of the Northern District of Illinois, who is currently presiding over approximately 150 coordinated or consolidated proceedings brought against the manufacturers of brand name prescription drugs known collectively as the "Brand Name Prescription Drugs Antitrust Litigation" or "MDL 997." (App. 60a). This action and the other MDL 997 cases all involve allegations of an illegal Sherman Act § 1 conspiracy (15 U.S.C. § 1) to deny retail pharmacies certain discounts and rebates that sometimes are provided to managed care organizations.

Respondent Huggins, an indirect consumer purchaser of brand name prescription drugs, filed this action in the Circuit Court of Clarke County, Alabama, on January 26, 1996. October 1, 1996 Order Denying Plaintiff's Motion for Remand ("Oct. 1 Order") 1996 WL 568793, at *1 (App. 45a). The sole count of the *Huggins* Complaint is brought under Alabama's antitrust statute, Ala. Code § 6-5-60, on behalf of all indirect consumer purchasers not only in the state of Alabama but also those in the District of Columbia and the states of Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico, and Wisconsin. 1996 WL 568793, at *2 (App. 46a). The manufacturers named in the *Huggins* Complaint are incorporated in eight different states; none is incorporated or has its principal place of business in Alabama. *Huggins* Complaint ¶¶ 21-43 (App. 78a-84a). Upon filing this action, and before serving the *Huggins* Complaint, Huggins obtained an *ex parte* order from the state circuit court conditionally certifying the class. (App. 64a-65a). Petitioners removed this action on February 29, 1996, pursuant to 28 U.S.C. § 1441, to the United States District Court for the Southern District of Alabama and asserted jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332. Subsequently, the MDL Panel transferred the case to Judge Kocoras so that it could be coordinated with the other cases in the MDL Proceedings (App. 60a-61a).

The allegations in the *Huggins* Complaint are virtually identical to those in *Price v. American Home Products, et al.*, 94 C 897 (N.D. Ill.) ("*Price*"), a case that has been (and remains) pending before Judge Kocoras as part of MDL 997 since 1994. Both were brought under the same Alabama antitrust statute, § 6-5-60 of the Code of Alabama. *Compare Huggins* Complaint ¶¶ 63-81 (App. 88a-93a) *with Price* Complaint ¶¶ 29-31 (App. 105a). Plaintiffs in both actions are purportedly consumer purchasers of brand name prescription drugs. *Compare Huggins* Complaint ¶¶ 18-20 (App. 77a-78a) *with Price* Complaint ¶ 4 (App. 99a). All of the manufacturer defendants named in *Price* are also defendants in *Huggins*.

Compare Huggins Complaint Caption (App. 73a-74a) *with Price* Complaint Caption (App. 98a). Some of the plaintiffs' counsel in *Price* are also counsel in *Huggins*. The central allegation of a price-fixing conspiracy is also the same in both actions. *Compare Huggins* Complaint ¶ 72 (App. 90a) *with Price* Complaint ¶ 19-20 (App. 102a-103a).

Nearly three years ago, the district court denied the *Price* plaintiffs' motion to certify an Alabama consumer class. *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1994 WL 663590 (N.D. Ill. Nov. 15, 1994) (App. 127a-128a). In that opinion, the district court held that in a consumer indirect purchaser action brought under the Alabama antitrust statute, "tracing the alleged overcharges from manufacturers, to wholesalers, to retailers, to consumers presents individualized issues which would dominate this litigation and preclude certification under rule 23(b)(3)." *Id.* at *7 (App. 128a).

Faced with this defeat, the *Price* plaintiffs, who had until that time been content to allow Judge Kocoras to hear their case, sought an order remanding the case to the Alabama courts. The district court denied that motion. *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1995 WL 56615 (N.D. Ill. Feb. 7, 1995) (App. 112a-116a). Finally, the *Price* plaintiffs moved to dismiss their case "without prejudice" with the intent of refiling their action in a potentially more favorable forum. In denying that motion, the district court noted, "[w]hile it is impossible to discern the *Price* plaintiffs' true intent, based on their reply memorandum and their actions following the class certification ruling, defendants' theory [that the *Price* plaintiffs are attempting to avoid the legal effects of the Court's decision denying class certification] is not implausible." *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1995 WL 495937, at *2 (N.D. Ill. Aug. 10, 1995) (App. 109a).

B. The District Court Found The Real Nature Of This Case To Be Federal

On July 31, 1996, Respondent filed his motion to remand for lack of subject matter jurisdiction. On October 1, 1996, the district court denied that motion, holding, *inter alia*, that federal jurisdiction existed on federal question grounds. The district court's holding was based on the artful pleading doctrine, which "provides that the courts 'will not permit [a] plaintiff to use artful pleading to close off [a] defendant's right to a federal forum.' " Oct. 1 Order, 1996 WL 568793, at *7 (App. 56a) (quoting *Moitie*, 452 U.S. at 398 n.2). As the district court explained (again quoting from *Moitie*), the issue of whether federal jurisdiction exists under the artful pleading doctrine requires a determination as to " 'whether the real nature of the claim is federal, *regardless of plaintiff's characterization*.' " Oct. 1 Order, 1996 WL 568793, at *7 (emphasis added) (App. 56a). In addition to determining that the Alabama antitrust statute, as construed by the Alabama courts, was limited to intrastate activity, the district court found, based on this controlling legal standard, that the Respondent's Complaint fell within the artful pleading doctrine "because, while on the surface alleging a violation of only the Alabama antitrust statute . . . , the complaint in truth alleges a violation of federal law." *Id.* (App. 57a). The district court explained that, on the face of the Complaint:

> The vast majority of the conduct at issue in the claim took place outside of the state. Even the majority of the plaintiff class, and the intervenors, are located outside of Alabama. This is a case that pits the entire brand-name prescription drug industry against the entire class of brand-name prescription drug purchasers in eight states and the District of Columbia. This is most certainly interstate, rather than intrastate, activity.

Id. at *8 (App. 58a).

Accordingly, based on Respondent's own allegations and the Court's conclusion that, as a matter of law, the Alabama antitrust statute "applies only to intrastate activity," the district court held that the artful pleading doctrine applied and that this case, therefore, involved a federal question.

C. The Seventh Circuit Rejected The District Court's Finding And Minimized The Importance Of *Moitie*

On October 22, 1996, Respondent moved to certify the October 1, 1996 order for immediate appeal pursuant to 28 U.S.C. § 1292(b). On December 16, 1996, the district court granted the certification motion, *see In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1996 WL 732834 (N.D. Ill. Dec. 16, 1996) (App. 34a-44a), and on May 7, 1997, the Seventh Circuit also certified the October 1 Order for immediate review. (App. 32a-33a).

The Seventh Circuit issued its opinion in this case on August 15, 1997 (App. 1a-29a). Although the Seventh Circuit found that Petitioners' arguments regarding federal jurisdiction got "a boost" from *Moitie* and that "the issue must be considered a close one because of persisting uncertainty . . . about the scope of the doctrine of artful pleading after *Moitie*'s footnote," the Seventh Circuit ultimately all but disregarded *Moitie*:

> The twist that *Moitie* gave to the doctrine is (very uncharacteristically for its author, Justice, now Chief Justice, Rehnquist) based on distrust of state courts, and, especially since it appears only in a footnote, should be narrowly construed in the interest of maintaining comity between the federal government and the states and keeping federal jurisdiction within the limits prescribed by Congress.

123 F.3d at 613 (App. 23a).

REASONS FOR GRANTING THE PETITION

Rather than attempt to apply *Moitie* to the facts before it, as other courts have in varying manners, the Seventh Circuit opted to read all meaning out of this Court's decision in that case. To reach its result the Seventh Circuit had to disregard the holding of *Moitie* and its progeny, misunderstand Petitioners' argument regarding the proper scope of the artful pleading doctrine, and ignore precedent regarding the limited scope of the Alabama state antitrust statute under which Respondent purports to bring his claim. If left undisturbed, this opinion will open the door for parties who have litigated and lost on critical issues in federal court to flout those federal rulings and attempt to relitigate those issues in state courts. It will also allow future plaintiffs to escape the jurisdiction of the federal courts when the only claims presented through their complaints are, like the MDL complaints they mimic, federal in nature.

. This case is a much more compelling candidate for the application of the artful pleading doctrine than is the *Rivet* case that this Court has already agreed to review. The Seventh Circuit found federal question jurisdiction lacking here despite the facts that, as in *Moitie*, (i) the present case represents a bald attempt to circumvent a prior federal court ruling that conclusively disposed of a pivotal issue, and (ii) the only possible claim alleged in Respondent's Complaint sounds in federal antitrust law. Granting certiorari will enable the Court to conduct a full analysis of the artful pleading doctrine.

A. *Rivet* Alone Fails To Present This Court With Facts Sufficient To Enable It To Clarify The Artful Pleading Doctrine

The Court's grant of a petition for certiorari in *Rivet* evidences the Court's recognition that the artful pleading doctrine as applied in *Moitie* is in need of clarification.

Resolution of *Rivet*, however, will not fully clarify the doctrine. While *Rivet* involves the proper application of the very same footnote of the *Moitie* decision at issue here, *Rivet* does not involve the breadth of issues and facts present here. *Rivet* solely concerns that aspect of the artful pleading doctrine that precludes plaintiffs from seeking to evade the *res judicata* effect of a prior, preclusive federal court judgment. Here, federal jurisdiction is present because Respondent is seeking to avoid not (as in *Rivet*) a claim-preclusive federal judgment in bankruptcy, but rather an issue-preclusive ruling on the determinative threshold question of class certification in a consumer class litigation. Moreover, removal was also proper here because Respondent sought to avoid federal court jurisdiction by artfully crafting a complaint that copies multiple prior federal complaints pending in MDL proceedings but, despite Respondent's purposeful failure to mention federal law, can be based only on the federal antitrust statutes. This second argument is completely inapplicable to the facts present in *Rivet* and is in no way presented to the Court through the *Rivet* petition.[2]

This Court's decision to grant certiorari in *Rivet* comes in the context of courts and commentators for more than a decade expressing difficulty in interpreting on a consistent basis the artful pleading doctrine as applied in *Moitie*. Even the Seventh Circuit panel in this case acknowledged that the jurisdictional issue was "a close one" because of "uncertainty" about the proper reading of *Moitie*. This stated difficulty has resulted in the creation of confusion among the federal courts regarding the scope of the doctrine. Some courts, such as the Second Circuit in *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d. Cir.), *cert. denied*, 479 U.S. 885 (1986), have viewed *Moitie* as an election of forums doctrine. In that case, the Second Circuit read *Moitie* as teaching that removal of a plaintiff's state law claim is appropriate

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[2] Moreover, based on the multiple certification issues presented by the *Rivet* petitioners, the Court may even find it possible to dispose of *Rivet* without reaching the *Moitie* issue.

where a plaintiff has first filed a federal claim based on federal law in federal court and later files an identical action in state court purportedly based on state law. *Id.* at 760-61. By contrast, the Fifth Circuit and the Ninth Circuit view *Moitie* as a doctrine that prevents the relitigation of already decided issues. *See Rivet*, 108 F.3d at 585-86; *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1374-75 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). Still other courts, including the district court here and the courts in the two cases cited by the *Moitie* Court itself, have found that where an action purports to be brought on state law claims but, in fact, is duplicative of pending federal cases and only presents potential federal violations, the action is an artfully pled federal claim. *See* App. 56a-59a; *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79 (E.D.N.Y. 1980) (cited by *Moitie*); *Three J. Farms v. Alton Box Bd. Co.*, Civ. No. 78-1257, 1979-1 Trade Cases ¶ 62,423, 1978 WL 1459 (D.S.C. Nov. 29, 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980) (cited by *Moitie*). To this mix, the Seventh Circuit has added its own conclusion: *Moitie* means nothing.

These varying views regarding the *Moitie* footnote have arisen in a context in which most courts and commentators that have discussed the footnote, regardless of their interpretation of it, agree on one issue: it needs further clarification. Thus, the *Rivet* majority itself acknowledged the mounting confusion experienced by federal courts in interpreting *Moitie*'s footnote 2:

> Regrettably, the Supreme Court did not explain precisely what there was about the plaintiffs' state law claims that was so "federal in nature" as to support removal under the artful pleading exception . . . . [T]he circuit courts have nevertheless attempted, as they must, to find meaning in *Moitie*'s enigmatic footnote.

Rivet, 108 F.3d at 584. *See also Travelers*, 794 F.2d at 759 (noting that "how far beyond the preemption context the Court intended to extend the artful pleading doctrine" is ambiguous

and that the *Moitie* footnote "approving the removal provides little illumination"); Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. Rev. 514, 531 (1996) ("[W]hile the scope of the artful pleading doctrine is unclear, the rule does undoubtedly afford some opportunity for a defendant facing overlapping class actions to eliminate the overlap by removing the state action to federal court, even when no federal claim is presented on the face of the state-court complaint"); Robert A. Ragazzo, *Reconsidering The Artful Pleading Doctrine*, 44 Hastings L.J. 273, 277 (1993) ("It is still unclear whether *Federated Department Stores [Moitie]* legitimizes removal based on a federal *res judicata* defense or on some other ground").

Given the stated difficulties of numerous courts and commentators in understanding what the Court meant in *Moitie*, there can be no doubt of the importance of definitively resolving the *Moitie* issue. Such definitive resolution requires consideration of the issues raised by this case along with the issues raised in *Rivet*.

B. Certiorari Should Be Granted In Order To Reaffirm The Well-Founded Protections Afforded By *Moitie* And The Artful Pleading Doctrine

The artful pleading doctrine as interpreted by *Moitie* rests on sound principles of fairness, judicial economy, and federalism. The facts of this case afford the Court the opportunity to articulate clearly these principles for application in future cases.

First, removal founded on *Moitie*-based artful pleading promotes fairness. The defendant pharmaceutical manufacturers in *Price* (like the defendants in *Moitie* and the property owners in the federal bankruptcy proceeding in *Rivet*) vigorously defended themselves in federal court and won. In *Price*, defendants' counsel spent months conducting discovery and gathering market and pricing data—and defendants' expert conducted extensive investigations and prepared a detailed report—to demonstrate conclusively that plaintiffs' claims did

not warrant class treatment. By refiling in state court, Respondent seeks to force Petitioners through the same extensive discovery and advocacy process. While Petitioners may persuade the state court that all class claims are barred by the denial of class certification in *Price*, thereby avoiding such duplicative discovery, they should not be compelled to assume the risk that "the state court might abet the plaintiff's effort to get around a dispositive defense or other fatal flaw in his federal case." 123 F.3d at 612 (App. 21a).

Second, an elimination of *Moitie*-based removal advocated by the Respondent would encourage forum shopping, with plaintiffs strategically attempting to select favorable state court venues where they believe they can obfuscate the true nature of their claims or the validity of their opponents' defenses. Courts have displayed little tolerance for such tactics:

> [I]t would be entirely unjust and inequitable [to allow plaintiffs to litigate class claims] . . . after having been denied in [prior action]. It is quite clear that plaintiff is shopping around for the forum which would be the most receptive to plaintiff's views. Our system of justice does not permit this type of action.

In re Piper Aircraft Distribution System Antitrust Litigation, 551 F.2d 213, 218 (8th Cir. 1977) (quoting district court opinion). Respodent's counsel strategically chose not to oppose removal and transfer in the *Price* case. Disappointed with the consequences of their decision, they asked the federal court to dismiss their complaint for lack of jurisdiction or, at least, to allow a voluntary dismissal without prejudice. Their requests were turned down. Now counsel for the same putative class of Alabama consumers have filed a Complaint in the name of another member of that alleged class (and others) in an attempt to relitigate their failed class certification arguments in what they presumably hope will be a more favorable forum. Federal courts should not sanction this manner of forum shopping.

Third, the proceedings in state court could also subject the Petitioners to the risk of inconsistent rulings. In fact, it was only the removal court that prevented just such inconsistent rulings in this case. Despite the denial of class certification in *Price*, the presiding state court judge in the present follow-on case had conditionally certified Respondent's class in an *ex parte* order even before the Complaint was served on the Petitioners. *Huggins v. Abbott Laboratories*, No. CV-96-24C (Circuit Court, Clarke County, Jan. 30, 1996) (order conditionally granting class certification) (App. 64a-65a). After the case was removed (and subsequently transferred to the Northern District of Illinois by the Judicial Panel on Multidistrict Litigation), the presiding federal district court judge vacated the state court's *ex parte* order, thereby eliminating the inconsistent state and federal court rulings.

These concerns are magnified in a case such as this where well over 150 separate related actions that have been filed across the country have been transferred by the MDL Panel to the Northern District of Illinois for coordinated treatment, precisely to avoid the problems referred to above. *See Lee's Prescription Shops, Inc. v. Chas. Pfizer & Co.*, Inc., 1970 Trade Cases ¶ 73,180, at 88,660, 1970 WL 504, at *5 (S.D.N.Y. 1970) (retaining removal jurisdiction to promote judicial economy and fairness); *Piper Aircraft*, 551 F.2d at 219 (relitigation of class certification denial "is wasteful and runs counter to the sound administration of multidistrict cases").

Fourth, federal courts are not—and should not be—powerless when parties seek recourse to state courts in order to avoid a federal court's prior preclusive ruling. Such end-run attempts are an affront to the federal judiciary, and a federal court's denial of remand in such circumstances is not only a sound judicial response but one consistent with principles of federalism. Under the circumstances presented below, as well as the circumstances presented in *Moitie* and in *Rivet*, federal courts could have enjoined the subsequent state court action

pursuant to the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988) ("The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court . . . [and] is founded in the well-recognized concepts of res judicata and collateral estoppel"); *but see J.R. Clearwater Inc. v. Ashland Chemicals Co.*, 93 F.3d 176 (6th Cir. 1996). Accordingly, the federal court's denial of remand in order to protect a prior preclusive ruling does not expand federal court jurisdiction.

C. Certiorari Should Be Granted To Dispel The Seventh Circuit's Suggestion That *Moitie* Means Nothing

As explained by *Moitie*, courts "will not permit [a] plaintiff to use artful pleading to close off [a] defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of [the] plaintiff's characterization." 452 U.S. at 398 n.2 (quoting 14 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3722 at 564-66 (1976)).[3] While

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[3] The full text of *Moitie*'s footnote 2 is as follows:

The Court of Appeals also affirmed the District Court's conclusion that *Brown II* was properly removed to federal court, reasoning that the claims presented were "federal in nature." We agree that at least some of the claims had a sufficient federal character to support removal. As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure 3722, pp. 564-566 (1976) (citing cases) (footnote omitted). The District Court applied that settled principle to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two Brown complaints, it found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state-law claims. We will not ques-

recognizing that the jurisdictional issue here is "a close one" because of "uncertainty" about the scope of *Moitie*, the Seventh Circuit panel effectively gave *Moitie* no meaning at all. In at least two respects, however, the facts of this case fall within federal removal jurisdiction as recognized by the well-founded *Moitie* opinion.

First, especially in light of the procedural posture in which it was decided, *Moitie* supports the view that a federal district court has jurisdiction to protect the integrity of its rulings where, as here, a plaintiff tries to circumvent a prior federal court ruling by refiling an essentially identical case in state court. Although similar to the *res judicata* issues raised by the *Rivet* case, this argument is distinct and will not necessarily be resolved by this Court's consideration of *Rivet*.

Second, the cases cited with approval by the majority of this Court in *Moitie* as well as Justice Brennan's dissent in that case clearly show that *Moitie* is broad enough to cover this case—an attempt to pursue a nonexistent state law claim based on the same facts underlying a series of federal cases pending for multidistrict coordination in a single federal court. Indeed, in a number of cases—not one of which was discussed by the Seventh Circuit panel—other courts have applied *Moitie* to facts similar to those present in this case and held that federal question jurisdiction was present. This issue is in no way raised by the *Rivet* case.

1. Under *Moitie*, The District Court Could Properly Assert Jurisdiction On Removal To Prevent Evasion Of Its Prior, Preclusive Ruling

The Seventh Circuit's rejection of *Moitie*'s artful pleading doctrine as a basis for removal is particularly inappropriate

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tion here that factual finding. *See Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F. Supp. 176 (N.D.N.Y. 1964); *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79 (E.D.N.Y. 1980); *Three J Farms, Inc. v. Alton Box Board Co.*, 1979-1 Trade Cases ¶62,423 (S.C. 1978), *rev'd on other grounds*, 609 F.2d 112 (CA4 1979), *cert. denied*, 445 U.S. 911 (1980).

where, as here, the procedural posture of the case before the Seventh Circuit was essentially the same as that before this Court in *Moitie*. In that case, plaintiff initially filed a complaint in a California state court (*Moitie I*) parroting the claims in pending federal antitrust actions. After the defendants successfully removed the case to federal court, *Moitie I* was dismissed for failure to state a claim. *Moitie*, 452 U.S. at 395. Seeking to circumvent that ruling, plaintiffs subsequently filed a virtually identical complaint in another California state court (*Moitie II*). As in *Moitie I*, the complaint in *Moitie II* was purportedly based on California law. The district court rejected this attempt to circumvent its prior ruling and denied plaintiff's motion to remand. This Court upheld that decision. *Id.* at 398 n.2.

This case presents a similar pattern. First, in the *Price* case, the plaintiffs filed a conspiracy claim under Alabama's antitrust statute on behalf of a putative class of all Alabama consumers against national pharmaceutical manufacturers. The case was removed to federal court and transferred to the Northern District of Illinois for consolidated pretrial treatment with numerous other MDL cases. After extensive discovery, expert reports, and briefing, the district court denied plaintiff's motion for class certification. The court also denied plaintiff's motions for remand and for dismissal without prejudice. Frustrated by the federal court's rulings, plaintiff in *Huggins* (Respondent here) attempted an end run by refiling the same substantive conspiracy claim under the same Alabama law on behalf of the same putative class of Alabama consumers (and consumers in other states) in another Alabama state court.

The principal difference between the two *Moitie* cases and *Price/Huggins* is that the plaintiff's entire claim in *Moitie II* was barred by the prior ruling in *Moitie I*, whereas in *Huggins* it is only the issue of class certification that is clearly barred.[4]

[4] Respondent Huggins is barred from relitigating his claim as a class action by the doctrine of collateral estoppel. The issues in *Price* and *Huggins* with respect to certification of a class of Alabama consumers are

However, this distinction is irrelevant when viewed within the framework of the rationale for the artful pleading doctrine—to avoid wasteful and unjust forum shopping where the relitigation in state court has no lawful basis for going forward, either because it is barred by a prior preclusive federal court ruling, as in *Moitie* itself, *see also Rivet*, 108 F.3d 576, because the state law claim otherwise fails to state a cause of action (see *infra* section C.2.), or because the action is preempted by federal law. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968).

As the Seventh Circuit recognized, while "the defendant should be able to defeat this maneuver [refiling] in state court by moving to dismiss the suit as frivolous," the defendant should not "be put to bother." 123 F.3d at 611 (App. 19a).

> [If] the sole basis for filing a state suit is to get around, however temporarily and hopelessly, a federal judgment, it can be argued that the new "state law" suit is really the old federal suit in a transparent guise and that the

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identical and class certification was actually litigated and necessarily decided. Although the lack of a final judgment in *Price* may prevent the application of *res judicata* as the Seventh Circuit suggests, 123 F.3d at 612 (App. 21a-22a); *but see Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961) (Friendly, J.), *cert. denied*, 368 U.S. 986 (1962); *Alexander v. Chicago Park Dist.*, 773 F.2d 850, 855-56 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986), the Seventh Circuit overlooked the fact that the issue of class certification was finally decided for collateral estoppel purposes. *See Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1191 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983) (" 'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.") (*citing Zdanok v. Glidden Co., Durkee Famous Food Div.*, 327 F.2d 944, 955 (2d Cir.) (Friendly, J.), *cert. denied*, 377 U.S. 934 (1964)); *In re Dalkan Shield Punitive Damages Litigation*, 613 F. Supp. 1112, 1116 (E.D. Va. 1985); *In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213, 219-220 (8th Cir. 1977). *See generally Aetna Casualty & Surety Co. v. Jeppeson & Co.*, 440 F. Supp. 394, 402-03 (D. Nev. 1977).

> federal court ought to say so in order to get rid of it quickly. . . .

123 F.3d at 612 (App. 21a).

By failing to uphold the district court's proper assertion of jurisdiction, the Seventh Circuit is forcing Petitioners to go back to state court to present to that court the preclusive effect of the district court's ruling that a class of Alabama consumers could not properly be certified. A proper reading of *Moitie*, however, teaches that this extra step is neither necessary nor appropriate. *Price* settled the class certification issue, and Respondent Huggins, who never claimed to have been represented by inadequate counsel in *Price*, is therefore precluded from relitigating that issue in state court. Like the federal court in *Moitie II*, and other courts before and after that decision,[5] the district court below asserted jurisdiction to protect a prior ruling with preclusive effect. That assertion of jurisdiction was a proper application of *Moitie*-based artful pleading, and the Seventh Circuit's failure to recognize this was error.

2. Respondent's Complaint, Which Tracks Existing Federal Complaints And Lacks Any Basis In State Law, Presents An Artfully Pled Federal Claim

Any attempt to understand *Moitie* should include an analysis of the three district court cases that this Court cited as examples of the artful pleading doctrine in *Moitie*'s footnote 2. Two of these three cases have facts strikingly similar to

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[5] *See, e.g., Baccus v. Parrish*, 45 F.3d 958, 960 (5th Cir. 1995) ("Federal jurisdiction is proper where a claim brought in a state court seeks to attack or undermine an order of a federal district court."); *Villareal v. Brown Express, Inc.*, 529 F.2d 1219 (5th Cir. 1976) (state court suit sought to circumvent two prior orders of federal court; federal question removal allowed); *Deauville Assoc., Inc. v. Lojoy Corp.*, 181 F.2d 5, 6 (5th Cir.), *cert. denied*, 340 U.S. 905 (1950) (plaintiff cannot "do by indirection in the state court what it had been denied the right to do . . . in federal court").

those present here. The Seventh Circuit, however, did not so much as mention any of these cases.[6]

In re Wiring Device Antitrust Litig., 498 F. Supp. 79 (E.D.N.Y. 1980) involved plaintiffs' attempts to avoid having their claim decided along with similar claims that had been consolidated as part of a multi-district litigation. In that case (as here), plaintiffs attempted to bring an action under state (here, Alabama, there, South Carolina) antitrust law to avoid an ongoing MDL proceeding that involved the same price-fixing allegations. Following removal to federal court, Judge Weinstein held that federal question jurisdiction was present over plaintiffs' purported state law claims through reasoning equally applicable here:

> A federal court need not blind itself to the real gravamen of a claim because plaintiff tenders a blindfold in the form of artificial characterizations in its complaint. Peeking to determine reality is particularly appropriate where it is apparent that the central federal claim is inseparable from the state law theory, and where the question of federal jurisdiction turns on the out-of-state status of the parties and the interstate nature of transactions complained of.

Id. at 82.

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[6] The Seventh Circuit in part bases its reversal of the district court on its finding that the Alabama statute at issue here, while clearly inapplicable to the claims of the purported non-Alabama class members, did in fact cover the interstate conspiracy claims of the Alabama plaintiffs. In reaching this erroneous conclusion regarding the application of the artful pleading doctrine, the Seventh Circuit misinterpreted Alabama precedent on the limited reach of the Alabama statute, *see, e.g.*, *Georgia Fruit Exchange v. Turnipseed*, 9 Ala. App. 123, 62 So. 542 (1913), and disregarded the fact that the scope of the Alabama statute is presently *sub judice* before the Alabama Supreme Court. *See Seven-Up Bottling Co. v. Archer-Daniels Midland Co.*, No. CV 95-43680 (Cir. Ct. Walker Cty. October 31, 1996), *appeal pending*, No. 1960220 (Ala.); *Durrett v. Upjohn*, No. CV 94-029-G (Cir. Ct. Greene Cty. December 12, 1996), *appeal pending*, No. 1960464 (Ala.).

Moitie also cites *Three J. Farms, Inc. v. Alton Box Bd. Co.*, Civ. No. 78-1257, 1978 WL 1459 (D.S.C. Nov. 29, 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980), a case purportedly also brought under South Carolina's antitrust laws and also transferred for multi-district coordination. The court rejected plaintiffs' efforts to remand the case to the South Carolina state courts, noting that "[e]ven though South Carolina has an antitrust law . . . its application was limited many years ago to exclude activities having an effect upon interstate commerce." *Id.* at *6. The court thus found that "the true nature of plaintiffs' claim . . . leads this Court to the inescapable conclusion that plaintiffs have set forth a cause of action under the Sherman Act and have used large portions of the allegations in the unified complaint to do so." *Id.* at *5. The court further reasoned: "It is obvious that the present plaintiffs are making a determined effort to prevent their action from being consolidated for pretrial proceedings with the other cases arising out of the same facts and allegations." *Id.* at *3. Read in the light of these cases, the *Moitie* analysis clearly applies to the facts present here.[7]

The Seventh Circuit did not come to grips with the language of the *Moitie* opinion or the cases cited in footnote 2.[8] Instead the Seventh Circuit asserted that the *Moitie* analysis could somehow be ignored because it is contained in a

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[7] The Seventh Circuit also ignored the fact that even Justice Brennan in his dissent did not in any manner criticize the cited lower court cases. Justice Brennan characterized *Wiring Devices* and *Three J Farms* as instances "in which the State itself had confined application of the state antitrust laws to purely intrastate commerce, thus leaving federal law the sole basis for suit." 452 U.S. at 410 n.6 (Brennan, J., dissenting).

[8] The dissent of Fifth Circuit Judge Edith Jones in *Rivet* explicitly acknowledges the significance of the cases cited by the *Moitie* footnote: "The Supreme Court's statement in *Moitie* that 'at least some of the claims had a sufficient character to support removal' should be interpreted in light of the authority and examples cited in support of that proposition." *Rivet*, 108 F.3d at 594 n.5 (Jones, J., dissenting) (citing *In re Wiring Device* and *Three J Farms*).

footnote and, in the view of the Seventh Circuit panel, appeared to be "uncharacteristic[ ] for its author." 123 F.3d at 613 (App. 23a). Such an assumption, however, is clearly unfounded given the fact that Justice Brennan's dissent expressly criticizes footnote 2 and the majority's decision to entertain a case in which Justice Brennan believed jurisdiction to be lacking. *See Moitie*, 452 U.S. at 405-10 (Brennan, J., dissenting). In fact, six of the seven pages of Justice Brennan's dissent were devoted exclusively to the scope of the artful pleading doctrine and the exercise of federal jurisdiction in that case. Justice Brennan wrote:

> The Court today nonetheless sustains removal of this action on the ground that "at least some of the claims had a sufficient federal character to support removal." . . . I do not understand what the Court means by this. Which of the claims are federal in character? Why are the claims federal in character? In my view, they are all predicated solely on California law. Certainly, none of them purports to state a claim under the federal antitrust laws, and the mere fact that plaintiffs might have chosen to proceed under the Clayton Act surely does not suffice to transmute their state claims into federal claims.

452 U.S. at 409.[9]

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[9] The Seventh Circuit's suggestion that the *Moitie* Court "did not say it *was* artful pleading—only that it would not question the district court's finding that it was," 123 F.3d at 612 (App. 21a) (emphasis in original), is incorrect. The Court expressly stated that "at least some of the claims had a sufficient federal character to support removal." *Moitie*, 452 U.S. at 398 n.2. In addition, the *Moitie* Court reached a decision on substantive aspects of the case before it, which would have been inappropriate if federal jurisdiction were lacking. Finally, if the *Moitie* Court simply deferred to the district court's "factual finding" of jurisdiction, then analysis of the artful pleading doctrine should be a factual inquiry fully within the province of the district court and not subject to appellate review other than for abuse of discretion. Given that the "artful pleading" issue in this case was a "close" question, the district court could not be found to have abused its discretion.

In addition to failing to consider either *In re Wiring Device*, *Three J Farms* or Justice Brennan's dissent, the Seventh Circuit also ignored several more recent federal court opinions that have applied *Moitie* to facts almost identical to those present here. Significantly, *Huggins* is not the first case to have involved the Alabama antitrust statute in the context of the well-pleaded complaint rule. In *In re NASDAQ Market Makers Antitrust Litig.*, 929 F. Supp. 174, 178 (S.D.N.Y. 1996), the court invoked the artful pleading doctrine in denying remand in a case involving allegations of an interstate conspiracy brought in Alabama state court under the same section of the Alabama antitrust statute at issue in this case. Relying on *Moitie*, the court rejected plaintiffs' contention that the complaint pled purely state law claims and found that the complaint "substantively mimic[ked] the language of" the MDL complaints and that "[t]he facts on which the two complaints rest are nearly entirely the same, and the Alabama state statute makes illegal essentially the same acts prohibited by the federal antitrust laws." *NASDAQ*, 929 F. Supp. at 178. As the *NASDAQ* court recognized, "the elements of the claim [a]re virtually identical to those of a claim expressly grounded on federal law." *Id.* at 178 (citations and internal quotation marks omitted). *NASDAQ*'s application of the artful pleading doctrine is directly on point. *See also Mechanical Rubber & Supply Co. v. American Saw & Mfg. Co.*, 747 F. Supp. 1292, 1296 (C.D. Ill.), *modified on other grounds*, 810 F. Supp. 986 (C.D. Ill. 1990) (federal jurisdiction present where plaintiffs' claims, purportedly brought under Illinois law, were based on interstate conduct, to which Illinois law did not apply); *Kahn v. Salomon Bros. Inc.*, 813 F. Supp. 191, 193 (E.D.N.Y. 1993) (plaintiffs artfully pled federal claims as state law claims "to avoid this coordinated attempt to resolve all claims" in a common MDL proceeding).[10]

[10] The facts present here actually suggest a more compelling argument for "artful pleading" treatment than did the facts of the cases cited above. As the Seventh Circuit correctly concluded, the vast majority of the putative class could not possibly have a claim under Alabama law because they are not alleged to have made any purchases (or even set foot) in Alabama. 123 F.3d at 612 (App. 22a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

November 3, 1997

Respectfully submitted,

/s/ KENNETH R. LOGAN

GEOFFREY C. HAZARD, JR.
Of Counsel
Trustee Professor of Law
University of Pennsylvania
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-7494

KENNETH R. LOGAN
Counsel of Record
Joseph F. Tringali
Jonathan K. Youngwood
Simpson Thacher & Bartlett
(a partnership which includes professional corporations)
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

Joel G. Chefitz
Stephen D. Libowsky
Katten, Muchin & Zavis
(a partnership which includes professional corporations)
Suite 1600
525 W. Monroe Street
Chicago, Illinois 60661
(312) 902-5200

Attorneys for American Home Products Corporation and American Cyanamid Company

J. Andrew Langan
Kirkland & Ellis
200 E. Randolph Drive
Chicago, Il. 560601
(312) 861-2064

Attorneys for Abbott Laboratories

Douglas D. Broadwater
Stephen S. Madsen
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, N.Y. 10019
(212) 474-1553

Thomas P. Sullivan
Richard T. Franch
Jenner & Block
One IBM Plaza
Chicago, Il. 60611
(312) 222-9350

Attorneys for Bristol-Myers Squibb Co.

Thomas F. Curnin
Cahill Gordon & Reindel
Eighty Pine Street
New York, N.Y. 10005
(212) 701-3609

Attorneys for Buroughs Wellcome Co.

Brian L. Sullivan
Paul Dennis Connuck
Whitman Breed Abbott & Morgan
200 Park Avenue
New York, N.Y. 10166
(212) 259-8000

Attorneys for Carter-Wallace, Inc.

Herschel S. Weinstein
Dornbush Mensch Mandelstam & Schaeffer
747 Third Avenue – 11th Floor
New York, N.Y. 10017
(212) 759-3300

Attorneys for Forest Laboratories, Inc.

Saul P. Morgenstern
Ricardo J. Hollingsworth
Dewey Ballantine
1301 Avenue of the Americas
New York, N.Y. 10019-6902
(212) 259-8000

Attorneys for Ciba-Geigy Corporation

Jerome I. Chapman
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

Attorneys for Glaxo Inc.

Robert K. Stanley
Baker & Daniels
300 N. Meridian Street – #2700
Indianapolis, In. 46204
(317) 237-1254

Attorneys for Eli Lilly and Company

David E. Everson
Stinson, Mag & Fizzell
1201 Walnut Street – #2800
Kansas City, Mo. 64106
(816) 842-8600

Attorneys for Marion Merrell Dow Inc.

Kenneth M. Kramer
Shearman & Sterling
Citicorp Center
153 E. 53rd Street
New York, N.Y. 10022
(212) 848-4172

Attorneys for Merck & Co., Inc.

William F. Cavanaugh, Jr.
Patterson, Belknap, Webb & Tyler
1133 Avenue of the Americas
New York, N.Y. 10036-6710
(212) 336-2793

Attorneys for Ortho Pharmaceuticals Corp.

Mary B. Cranston
Pillsbury, Madison & Sutro
225 Bush Street
P.O. Box 7880
San Francisco, Ca. 94120
(415) 983-1621

Attorneys for Rhone-Poulenc Rorer, Inc.

Robert H. Rawson, Jr.
Thomas Demitrack
Jones, Day, Reavis & Pogue
North Point
901 Lakeside Avenue
Cleveland, Oh. 44114
(216) 586-7216

Attorneys for Sandoz Pharmaceutical Corporation

David Klingsberg
Michael Malina
David Copeland
Kaye, Scholer, Fierman, Hays & Handler, LLP
425 Park Avenue
New York, N.Y. 10022
(212) 836-8281

Attorneys for Pfizer Inc.

John W. Nields, Jr.
Marguerite S. Boyd
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402
(202) 383-6639

Michael M. Conway
Hopkins & Sutter
Three First National Plaza
Chicago, IL 60602-4205

Attorneys for Schering-Plough Corporation

Arthur Makadon
Ballard Spahr Andrews & Ingersoll
1735 Market Street – 51st Floor
Philadelphia, Pa. 19103-7599
(215) 662-5520

Attorneys for SmithKline Beecham Pharmaceuticals Corporation

John Treece
Sidley & Austin
One First National Plaza
Chicago, Il. 60603-2279
(312) 853-7427

Attorneys for G.D. Searle & Co.

Herbert Dym
David L. Meyer
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566

Attorneys for Warner-Lambert Company

Larry J. Saylor
Miller, Canfield, Pakkock & Stone
150 W. Jefferson – #2500
Detroit, MI 48226
(313) 496-7686

Attorneys for The Upjohn Company

Arthur F. Golden
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
(212) 450-4388

Attorneys for Zeneca Inc.

APPENDICES

Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 96-2814, 96-2458, 96-2485 & 97-2156

IN RE BRAND NAME PRESCRIPTION DRUGS
ANTITRUST LITIGATION

APPEALS OF ROBERT A. HUGGINS, *et al.*

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
MDL No. 997—Charles P. Kocoras, *Judge*.

Argued June 25, 1997—Decided August 15, 1997*

Before POSNER, *Chief Judge*, and BAUER and DIANE P. WOOD, *Circuit Judges*.

POSNER, *Chief Judge*. We have consolidated for decision four appeals (in two of which we have jurisdiction under 28 U.S.C. § 1292(b) and in the other two under 28 U.S.C. § 1291 and Fed. R. Civ. P. 54(b)) from rulings in a huge price-fixing litigation that the Judicial Panel on Multidistrict Litigation has consolidated in the Northern District of Illinois for pretrial proceedings. The consolidation covers hundreds of sep-

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* The decision is being released in typescript.

arate cases (a number of them class actions) brought under section 1 of the Sherman Act, 15 U.S.C. § 1, by retail pharmacies against manufacturers and wholesalers of prescription drugs. The pharmacies complain that the defendants have conspired among themselves to deny all pharmacies, including chains and buying groups, discounts off the list price of brand-name drugs that the manufacturers sell to the wholesalers and that the wholesalers in turn resell to the pharmacies. A brief sketch of the operation of the alleged conspiracy will provide the essential background to understanding the issues presented by these appeals.

While refusing to give pharmacies any discounts, the defendants give steep discounts to favored classes of customers, including hospitals, health maintenance organizations, nursing homes, and mail-order companies. The defendants maintain this differential pricing through a "chargeback" system. Under that system, the manufacturer makes a contract with the favored customer establishing a discounted price at which the customer is entitled to buy from wholesalers; the wholesaler sells to the favored customer at that price; and the manufacturer then reimburses the wholesaler for the difference between the regular wholesale price and the discounted price. So if the manufacturer's regular price to the wholesaler for some drug is $100 and the contractually agreed upon discounted price for a favored customer is $75, the wholesaler will pay the manufacturer $100 for the drug but resell it to the favored customer ar $75 and bill the manufacturer $25. The plaintiffs claim that the purpose of the chargeback system is to make it difficult for the favored customers to engage in arbitrage, that is, to buy more than they need and resell the surplus to pharmacies at a price between the discounted price that the favored customers pay and the higher, undiscounted wholesale price that nonfavored customers pay. The chargeback system permits the wholesalers to buy cheap only when they are reselling to someone whom the manufacturer wants to be given a discount.

The defendants' differential pricing of their drugs is discriminatory in the technical economic sense—it involves charging different prices for the same goods, the differences being unrelated to savings in the costs of serving the favored customers. When the lower of two discriminatory prices covers the seller's cost, the higher price must exceed that cost. This creates an incentive for the favored purchasers to order more of the good than they need for their own use and to sell the surplus to disfavored customers at a price somewhere in between the seller's different prices. For example, an $80 resale by a hospital or other favored customer that had bought at $75 to a pharmacy that had bought at $100 would make both parties to the resale better off; the hospital would have a profit of $5 and the pharmacy would obtain a cost savings of $20. This is arbitrage and would erode the two-price system. The chargeback system prevents arbitrage. The wholesaler who resold to a pharmacy at a significant discount would incur a loss, since he would not be able to charge back any part of the discount to the manufacturer. Although a federal statute forbids hospitals and other providers of health care to resell to other sellers the pharmaceutical drugs that they buy, the statute does not cover all the favored customers for such drugs. 21 U.S.C. § 353(c)(3). Anyway statutes are not always fully obeyed. The chargeback system fills the gap in the statute's coverage and does not require heavy enforcement costs.

The presence of price discrimination in the economic sense is evidence of the presence of monopoly power—the power to raise price above cost without losing so many sales as to make the price rise unsustainable. If the lower price covers the seller's cost, the higher price must exceed it; so competition must be weak or absent, because it has failed to force price down to cost (including in "cost" a reasonable return on investment). Since monopoly power can be created by collusion among competing sellers, the existence of industry-wide price discrimination is some evidence of collusion. But it is not conclusive evidence, especially in an industry such as

pharmaceuticals many of the products of which are patented. The sellers may be selling goods that although close substitutes are not perfect substitutes, with the result that each seller has some monopoly power and therefore can price discriminate unilaterally. It might want to do so to take advantage of the fact that some consumers are less able to resist high prices than others. A fully developed record might show, in accordance with contested evidence in the record compiled to date, that a pharmacy has little choice but to buy a wide range of competing drugs because it cannot know in advance which drug its customers' doctors will prescribe. An HMO, however, can (within limits) tell the doctors it employs what drugs to prescribe, and it can use that power to extract price concessions from the individual manufacturers, who naturally however do not wish to extend the concessions to captive consumers such as the pharmacies.

In the extensive pretrial proceedings that have been conducted to date in this litigation, the plaintiffs have presented evidence that the defendant manufacturers agreed among themselves, and also with the defendant wholesalers, to refuse discounts to pharmacies and to make this refusal stick by adopting the chargeback system in order to prevent arbitrage. In other words, the claim is that pervasive price discrimination in the pharmaceutical market is the result not of individual decisions by manufacturers who possess some monopoly power but of an agreement to practice price discrimination. The plaintiffs' objection is not to the discrimination as such; although there is a Robinson-Patman claim in the complaint, it is not part of the appeal. The plaintiffs' objection is to having to pay high prices that, but for the defendants' alleged conspiracy, would be brought down by competition.

One might have supposed that if the defendants were going to collude on price, they would go the whole hog and agree not to provide discounts to the hospitals and other customers favored by the discriminatory system. But the defendants' cartel—if that is what it is—may not be tight enough to pre-

vent hospitals and other bulk purchasers with power to shift demand among different manufacturers' drugs from whipsawing the members of the cartel for discounts; or maybe these purchasers could shift demand to manufacturers that are not members of the cartel. If, for whatever reason, the elasticity of demand for a cartel's product differs among groups of purchasers, a single cartel price will not be profit-maximizing unless discriminatory price scheme cannot be enforced at reasonable costs.

The manufacturers moved for summary judgment, arguing that there wasn't enough evidence of collusion to warrant a trial. The district judge denied the motion. The correctness of his ruling is not before us. And whether it was correct or not, the reader should bear in mind that the manufacturers have not been found to have violated the Sherman Act; the only determination is that there is enough evidence of a violation to require that the case be allowed to proceed to trial.

The judge granted summary judgment to one of the manufacturers, however, DuPont Merck Pharmaceutical Company. The plaintiffs' appeal from that ruling is one of the four appeals before us. The judge also granted summary judgment to the wholesaler defendants because he thought there was insufficient evidence of their participation in the manufacturers' conspiracy to warrant a trial. That is another ruling appealed from. Another is the judge's refusal to dismiss indirect-purchaser claims by pharmacies that paid overcharges as a consequence of the alleged manufacturers' conspiracy. The manufacturers argued unsuccessfully that only the first tier of purchasers ("direct purchasers"), composed of the wholesalers and others who purchased drugs directly from the manufacturers, and not the second tier, composed of pharmacies that purchased the manufacturers' drugs from the wholesalers ("indirect purchasers"), are permitted to bring a suit for overcharges under the Sherman Act. In the last ruling that has been appealed to us, the judge refused to remand a class action that alleges violations not of the Sherman Act but of

Alabama's antitrust statute, which expressly authorizes suits by indirect purchasers.

The indirect-purchaser issue (with which we begin) is separate from the issue of the wholesalers' participation in the manufacturers' alleged conspiracy. It is true that if we reversed the judge's ruling on the latter issue and so reinstated the wholesalers as defendants, and if the plaintiffs went on to obtain a judgment against the wholesalers and manufacturers, any indirect-purchaser defense would go by the board, since the pharmacies would then be direct purchasers from the conspirators. *Fontana Aviation, Inc. v. Cessna Aircraft, Co.*, 617 F.2d 478, 481 (7th Cir. 1980); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1212–13 (9th Cir. 1984); see also *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979) (requiring that the direct sellers, here the wholesalers, be joined as defendants—but that requirement is satisfied). But even if we do reinstate the wholesalers as defendants, an issue discussed later in this opinion, the plaintiffs may fail at trial to establish their liability, in which event the indirect-purchaser issue will be decisive. So, the issue being fully briefed and argued in this court, we should decide it; and the fact that it may in the end not prove decisive does not show that the district judge and we were wrong to certify his ruling on the issue under 28 U.S.C. § 1292(b) (interlocutory appeal of a ruling on a controlling question) for an immediate appeal. *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 658-59 (7th Cir. 1996); *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3930, pp. 426-27 (2d ed. 1996).

A brief review of the evolution of the indirect-purchaser doctrine in the Supreme Court will point us toward a resolution of the issue. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the defendant in a Sherman Act suit, a manufacturer of machinery for making

shoes, defended on the ground that the plaintiff, a shoe manufacturer that had bought the defendant's machinery, had passed on any monopoly overcharge to its own customers, the wholesale purchasers of its shoes, and hence had not been injured. A firm hit with an increase in the cost of one of its inputs will try so far as competition allows to pass that cost on to its customers in the form of a higher price for its product. The Supreme Court held, however, that an antitrust defendant would not be permitted to defend against a damages suit on the ground that the plaintiff had shifted the cost of the defendant's wrongdoing to the plaintiff's customers. Such a defense would complicate antitrust enforcement by requiring an apportionment of damages between different tiers of purchasers of the defendant's product. Tracing a price hike through successive resales is an example of what is called "incidence analysis," and is famously difficult.

The Court took the next step in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and held that the second or subsequent tiers, the indirect purchasers from the antitrust violators, couldn't sue; only the first tier could. This was a logical corollary of the rejection of the passing-on defense in *Hanover Shoe*, since to determine the damages suffered by subsequent tiers of purchasers would require the very apportionment of damages that the Court had rejected in the earlier case.

Illinois Brick left unclear whether there might be exceptions for cases in which the amount of the overcharge that was passed on to a lower tier of purchasers could be determined simply and with mechanical precision. A plausible example, we thought, would be a case in which the first tier of purchasers consisted of public utilities that as a consequence of government regulation passed on any cost increase dollar for dollar to their customers. *Illinois v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir. 1988) (en banc). Shortly afterward, in a similar case, the Supreme Court held that such cases are not within any exception to the *Illinois Brick* doctrine, *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990),

and we duly overruled our *Panhandle* opinion. *Illinois v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991). *Utilicorp* implies that the only exceptions to the *Illinois Brick* doctrine are those stated in *Illinois Brick* itself—"where the direct purchaser is owned or controlled by its customer," 431 U.S. at 736 n. 16, or, we suppose, vice versa. The first exception (ownership) is conceded to be inapplicable here; the wholesalers are not corporate affiliates of the manufacturers. The second (control) is inapplicable as well. The manufacturers do not control the wholesalers through interlocking directorates, minority stock ownership, loan agreements that subject the wholesalers to the manufacturers' operating control, trust agreements, or other modes of control separate from ownership of a majority of the wholesalers' common stock. *Jewish Hospital Ass'n v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 975 (6th Cir. 1980); cf. *Gould v. Ruefenacht*, 471 U.S. 701, 705 (1985).

The district judge held, however, primarily on the basis of the chargeback system, that the wholesalers are really nothing more than "glorified warehouses" of the manufacturers. In so ruling, the judge gave undue weight to the chargeback system. The favored customers, the ones who had contracts with the manufacturers though they took delivery from the wholesalers, are not parties to this litigation. They certainly are not complaining about the system of discriminatory pricing. They were not overcharged, and their right if any to recover overcharges in a suit against the manufacturers is not in issue. The plaintiffs are the disfavored customers. They did not have contracts with the manufacturers, they did not receive discounts, and the wholesalers did not receive chargebacks on sales to them. The plaintiffs' complaint is that they were overcharged because the wholesalers passed on to them the overcharge that the wholesalers had to pay the manufacturers by virtue of the price-fixing conspiracy. This is just the kind of complaint that *Illinois Brick* bars. The only entities permitted to complain about the manufacturers' overcharging the wholesalers are the wholesalers themselves, the direct

purchasers, even if every cent of the overcharge was promptly and fully passed on to the pharmacies in the form of a higher wholesale price.

Some wholesalers were plaintiffs in this litigation; they settled. Had they not done so, and had the case proceeded to trial and the pharmacies been permitted to seek damages for the amount of the overcharge passed on to them, the court would have had to apportion the overcharge between the wholesalers and the pharmacies. That's just what the Supreme Court in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp* told the federal courts not to do.

We can imagine the present case reconfigured in a way that might take it out of the orbit of these decisions; it would not be a matter of carving a further exception. A number of pharmacies have tried to improve their bargaining position vis-à-vis the drug manufacturers by forming buying groups. The bigger a buyer is, the more likely it is to be able to obtain a discount from a member of a cartel, since the volume of its purchases may compensate the member for endangering the cartel by granting a discount. George J. Stigler, "A Theory of Oligopoly," in Stigler, *The Organization of Industry* 39, 43-44 (1968). That is one motive for forming a buying group. The manufacturers have been steadfast in refusing to grant discounts to such groups. If this refusal, taking as it does the form of a refusal to enter into direct contractual relations with certain retailers, such as the manufacturers have with their favored customers, were successfully challenged as a boycott, *see FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428 (1990); *FTC v. Indiana Federation of Dentists*, 476 U.S 447, 458-59 (1986); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 479 (7th Cir. 1988), the *Illinois Brick* rule, which is a rule concerning overcharges, would fall away. The plaintiffs would be permitted to prove up whatever damages they could show had flowed from the boycott, *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 585 n. 47 (3d Cir. 1979), provided they weren't seeking to recover overcharges, for that would entail the very incidence

analysis that *Illinois Brick* bars. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 966-68 and n. 21 (3d Cir. 1983). But that is precisely what they *are* seeking. The certified class is of pharmacies that paid overcharges, and the certification was based on the uniformity of the harm. It would be more difficult to justify class treatment of a boycott of buying groups. Compare *White Industries, Inc. v. Cessna Aircraft Co.*, 845 F.2d 1497, 1502-03 (8th Cir. 1988), with *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977). That may be why the plaintiffs have not cast their case in the boycott mold. We need not decide whether it is still open to them to do so in the district court.

To conclude our discussion of the drug manufacturers' federal antitrust liability to the indirect purchasers, the federal class actions should have been dismissed unless the wholesalers should not have been dropped as defendants, an issue we take up later. The Alabama class suit, which the district judge refused to remand, also involves the indirect-purchaser question; so let us turn to that suit. It was actually the second prescription-drug price-fixing suit brought in the Alabama state courts. The first had been removed to federal district court under the diversity jurisdiction and then transferred by the multidistrict panel to the Northern District of Illinois for consolidation with the other prescription-drug price-fixing suits. The district court had denied a motion to remand, so the suit remains in that court. Then our Alabama suit was filed, and like the first suit it was removed to federal district court and transferred to the Northern District of Illinois. It is a class suit on behalf of consumers in several states, not only Alabama, and it names as defendants a large number of drug manufacturers none of which either is a citizen of Alabama or sells exclusively to that state's residents. The suit is based, or at least purports to be based, on an Alabama statute that is modeled on the Sherman Act but that contains a provision which expressly authorizes indirect-purchaser claims—the very type of claim that *Illinois Brick* bars in suits under the Sherman Act. Ala. Code § 6-5-60(a). The defendants argued,

and the district court agreed, that the suit is removable to federal court under both the diversity statute and, by virtue of the doctrine of "artful pleading," the federal-question statute as well. 28 U.S.C. §§ 1331, 1332.

There is complete diversity of citizenship among the parties; the question, so far as the issue of diversity jurisdiction is concerned, is only whether the minimum amount in controversy required to maintain a diversity suit in federal court ($50,000 at the time the suit was filed) is present. The court cannot just add up the damages sought by each member of the class. *Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973); *In re Corestates Trust Fee Litigation*, 39 F.3d 61, 64 (3d Cir. 1994). At least one named plaintiff must satisfy the jurisdictional minimum. If he does, the other named plaintiffs and the unnamed class members can, by virtue of the supplemental jurisdiction conferred on the federal district courts by 28 U.S.C. § 1367, piggyback on that plaintiff's claim. That is, they remain plaintiffs, or unnamed members of the class, as the case may be, even though their own claims are for less than the jurisdictional minimum amount. So the Fifth Circuit held in *In re Abbott Laboratories*, 51 F.3d 524, 527-29 (5th Cir. 1995), and we signified our agreement with that holding *in Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-33 (7th Cir. 1996), and repeat it today.

The plaintiffs in this case, however, because they did not want their case removed to federal court, were careful to plead that the damages sought by each did not exceed $50,000. This is plausible—you would have to buy an awful lot of expensive drugs to run up a bill the overcharge portion of which alone was more than that amount. And plausible or not, a plaintiff can always stay under the minimum amount in controversy by waiving his right to more, *In re Amino Acid Lysine Antitrust Litigation*, 918 F. Supp. 1181, 1185-86 (N.D. Ill. 1996), though these plaintiffs have nor established that they did mean to waive their right.

Compensatory damages, which we have just seen are not likely to exceed $50,000 for any of the named plaintiffs, are not the only form of monetary relief sought, however. The antitrust statute on which the Alabama class action is based authorizes the court to award up to $500 for each "instance of . . . injury or damages" as a statutory penalty, in addition to any compensatory damages. Ala. Code § 6-5-60(a). But the defendants cannot simply wave the statute in our faces. They have the burden of establishing federal jurisdiction when they seek to remove a case from state to federal court, and so they must present *evidence* of federal jurisdiction once the existence of that jurisdiction is fairly cast into doubt. *Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 427 (7th Cir. 1997); *Wellness Community-National v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995); *Selcke v. New England Ins. Co.*, 2 F.3d 790, 792 (7th Cir. 1993). It was cast into doubt here by the complaint itself, which does not allege stakes in excess of $50,000 or facts from which such stakes can readily be inferred. Yet the defendants presented no evidence that, even with the statutory penalty added to the compensatory damages sought, any of the named plaintiffs is asking for more than $50,000. The defendants point out that it is *possible* that at least one of the plaintiffs had more than $50,000 in damages and penalties. A hundred purchases within the four-year period covered by the complaint would carry a purchaser over the threshold, even if the overcharge on each purchase was tiny, because each purchase, constituting we assume a separate "instance of . . . injury or damage," would entitle the purchaser to the $500 statutory penalty. But the defendants put in no evidence that any of the named plaintiffs in fact made this many purchases. Instead they argue that under Alabama law the *entire* statutory penalties awarded in a case are the indivisible penalty for a defendant's misconduct and so are the stakes in *each* of the plaintiffs' claims. If this is correct, and the plaintiffs have not waived a claim for total damages (compensatory damages plus the penalty) per plain-

tiff of more than $50,000, then the defendants had no need to present any evidence on the jurisdictional issue.

In arguing their interpretation of the Alabama statute, with the support of *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996), and less directly of *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1334 (5th Cir. 1995), but in opposition to *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1428-31 (2d Cir. 1997), the defendants are gesturing toward the Supreme Court's statement in *Snyder v. Harris*, *supra*, 394 U.S. at 355, that when "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest," the amount in controversy is the aggregate in which they each have their undivided share. An example is an action by the heirs of an intestate estate against the estate's administrator. A successful prosecution of the action would result in making the estate larger, and each heir would have an undivided interest in the larger, as in the original, estate. *Shields v. Thomas*, 58 U.S. (17 How.) 3 (1855). Other examples are set forth in *Gilman v. BHC Securities, Inc.*, *supra*, 104 F.3d at 1423.

This is not such a case. The penalty prescribed by the Alabama statute is presumably per violation, that is, per sale at an unlawful price; and it is awarded to the victim of the particular violation, the direct or indirect buyer, rather than to the victims of the price-fixing conspiracy as a group or to a representative member of the group. If one plaintiff disclaimed the penalty awarded him under the statute, or settled with the defendant for an amount that included no penalty, the penalty thus forsworn would not go to another plaintiff; it would be subtracted from the total amount of penalties assessed against the defendant. Indeed, if the court had awarded the maximum penalty to each victim, it would be *impossible* for the court to shift the disclaimed penalty to another of the victims; to do so would pierce the ceiling. But we take it that even if one victim had received $300 rather than $500, the court would not give him another $200 if another victim had disclaimed his own $300 penalty.

It is possible we suppose that the judge could fix some amount that represented in his mind the proper punishment for the defendant's misconduct; divide that amount by the number of plaintiffs; and if the result of the division was greater than $500, cut down the aggregate accordingly. But even if, in acting so, the judge would be complying with the spirit as well as the letter of the statute, the resulting fund would not be a piece of property to which the plaintiffs had undivided rights. None of the victims would have an undivided right in a common fund or *res* such that if one claimant fell out the others' shares would grow. *Sellers v. O'Connell*, 701 F.2d 575, 579) (6th Cir. 1983); *Eagle Star Ins. Co. v. Maltes*, 313 F.2d 778, 781 (5th Cir. 1963).

A plaintiffs award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant. E.g., *Allen v. R & H Oil & Gas Co.*, *supra*, 63 F.3d at 1334; *Dunn v. Hovic*, 1 F.3d 1371, 1385-86 (3d Cir. 1993); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-41 (2d Cir. 1967) (Friendly, J.). This rule has been criticized (as by Judge Friendly in *Roginsky*), but whether it is a good rule or a bad rule it shows that the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct. *Gilman v. BCH Securities, Inc.*, *supra*, 104 F.3d at 1428-31. The rule may have to be qualified now that the Supreme Court has held that excessive awards of punitive damages violate the due process clause. *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). For it could be argued that a piling on of awards by different courts for the same act might result in excessive punishment for that act. We need not decide whether this argument would ever succeed; it is unlikely to succeed to the point of converting entitlements to punitive damages from individual to collective entitlements.

That the defendants have failed to show that the plaintiffs are seeking more than $50,000 apiece against each defendant cannot be the end of our analysis of diversity jurisdiction. The

complaint seeks an injunction against the alleged conspiracy as well as damages and the penalty, and the defendants argue that it will cost them more than $50,000 to comply with the injunction even though the only plausible form of injunctive relief in a case like this would be to order the defendants to stop fixing prices. There are four ways in which a request for an injunction might be thought to carry a case over the amount in controversy threshold. The first way—plainly *one* valid way, e.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347 (1977); *Gould v. Artisoft, Inc.*, 1 F.3d 544, 548 n. 4 (7th Cir. 1993); *Justice v. Atchison, Topeka & Santa Fe Ry.*, 927 F.2d 503, 505 (10th Cir. 1991); *Smith v. Washington*, 593 F.2d 1097, 1099 (D.C. Cir. 1978), and some courts think the *only* valid way, *Kheel v. Port of New York Authority*, 457 F.2d 46, 49 (2d Cir. 1972); *Bernard v. Gerber Food Products Co.*, 938 F. Supp. 218, 220-22 (S.D.N.Y. 1996)—is if the value of the injunction to the plaintiff exceeds the statutory minimum. So we could look to the present value of the future cost savings that each plaintiff anticipated from the cessation of each defendant's price fixing. No effort to quantify this value or array of values in even the roughest terms has been made, however, so we put it to one side.

Although one of our cases adopt the "plaintiff only" position, *Freeman v. Sports Car Club of America, Inc.*, 51 F.3d 1358, 1362 (7th Cir. 1995), it overlooked a decision in which we had squarely rejected that position in favor of the "either viewpoint" (plaintiff's or defendant's) approach, *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389 (7th Cir. 1979). Looked at from the defendants' standpoint, the minimum amount in controversy would be present if the injunction sought by the plaintiffs would require some alteration in the defendant's method of doing business that would cost the defendant at least the statutory minimum amount. See, e.g., *id.* at 391. This ground is not argued either. Often it will be equivalent to the previous ground, the value of the injunction to the plaintiff. The defendant would be willing to pay the plaintiff up to a shade less than the cost that the injunction would impose on

the defendant to induce the plaintiff to abandon his quest for injunctive relief. In that way the cost to the defendant would be transmuted into an equivalent value to the plaintiff. If, however, there are multiple plaintiffs, actual or potential, the defendant will not be willing to pay each one as much as he would if there were only one possible plaintiff. It may seem paradoxical to defeat removal in the multiplaintiff setting on this basis. But it is implicit in the rule that forbids aggregation of class members' separate claims that it will sometimes be more difficult for a defendant desiring to remove a diversity case to federal court to establish the minimum amount of controversy in a multiplaintiff case than in a much smaller single-plaintiff case. Compare a class action in which one million class members each has a claim worth $1 with a case in which a single plaintiff has a claim worth $100,000. There is diversity jurisdiction in the second case but not (because of the nonaggregation rule in class actions, the rule of *Snyder* and *Zahn*) the first.

Concern has been expressed that if the cost to the defendant may be used to establish the minimum amount in controversy in an injunction case, it may be used for this purpose in a damages case, and then the nonaggregation rule will be circumvented. E.g., *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993). The concern is misplaced. Whatever the form of relief sought, each plaintiff's claim must be held separate from each other plaintiff's claim from both the plaintiff's and the defendant's standpoint. The defendant in such a case is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated. *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977). The question then becomes, as with the penalty statute, whether each plaintiff is asserting an individual right or, rather, a right to an undivided interest in something. In this case it is the former. Each plaintiff has a right to be free from the indirect effects of collusive pricing. Moreover, the grant of an injunction in favor of a single plaintiff would be unlikely to impose a heavy cost on any of the defendants; each defendant could

continue in its own way of pricing with respect to all other plaintiffs. The test, we repeat, is the cost to each defendant of an injunction running in favor of one plaintiff; otherwise the nonaggregation rule would be violated.

Still another way in which the requirement of the statutory minimum amount in controversy can be satisfied in an injunctive case is by showing that the injunction would force the defendant to forgo a benefit to him that is worth more than the threshold amount specified in the diversity statute, e.g., *Grotzke v. Kurz*, 887 F. Supp. 53 (D.R.I. 1995), as where the suit asks that the defendant be enjoined from completing a lucrative transaction. That is not argued here either. The reason may be that while an injunction against price fixing might prevent a defendant from engaging in lucrative unlawful transactions, it would not deprive the defendant of a *legally protected* interest. It would not be like the case in which the defendant, in order to extirpate the effects of its unlawful act, is forced to restructure its operations at a cost that may greatly exceed any profit it made from the act. Structural relief is frequently decreed in merger cases under section 1 of the Sherman Act or section 7 of the Clayton Act or in monopolization cases under section 2 of the Sherman Act, but very rarely in a price-fixing case, such as we have here.

The last way of satisfying the requirement of the minimum amount in controversy in an injunction case, the way principally argued by the defendants, is that a defendant's clerical or ministerial costs of compliance might carry a case across the threshold. Even if an injunction doesn't require the defendant to restructure its business or give up a lucrative lawful business opportunity, but merely tells him to stop doing something illegal, such as conspiring to fix prices, there will be lawful costs of compliance. Just the cost of duplicating an injunction in a case such as this and distributing the copies to all the relevant personnel might exceed $50,000 for each defendant, and, if so, this would argue for allowing removal to federal court. The argument would be the same as before—given the possibility of a settlement, a suit is worth as much to

the plaintiff in the form of an expected value of settling it as it is costly to the defendant, at least in the single-plaintiff case. But if the argument were accepted, then every case, however trivial, against a large company would cross the threshold, whether the threshold was $50,000 or as it now is $75,000, even if the plaintiff were asking for an injunction against disclosing his unlisted telephone number. It would be an invitation to file state-law nuisance suits in federal court. We needn't bite this bullet. The defendants have made no effort to show that what is conceivable is also probable by quantifying the internal cost of compliance to each of them and then adding it to a plaintiff's compensatory damages and penalty entitlement.

The alternative basis on which the district court permitted the removal of the Alabama suit to the federal district court was the "artful pleading" doctrine. The doctrine is usually taken to mean that if federal law has so far occupied a field of disputes as to extinguish any basis in state law for seeking a resolution of the dispute, a plaintiff cannot prevent removal by casting his claim as one under state law—it must actually be a claim under federal law because only federal law could supply a ground for relief. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393-94 (1987); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), *Kaucky v. Southwest Airlines Co.*, 109 F.3d 349, 351 (7th Cir. 1997). And as such it can be removed to federal court even if it is not within the diversity jurisdiction, and, by virtue of 28 U.S.C. § 1441(e) (added in 1986), even if the state court could not have exercised jurisdiction over the case because it is a type of case that is within the exclusive jurisdiction of the federal courts, as well as being a case in which only federal law can supply the rule of decision.

It may seem odd to allow removal and retention in such cases, rather than to trust the state court to dismiss a suit that is frivolous because it is based on nonexistent (because preempted) state law, especially since a defense of preemption is normally not a basis for removal and is therefore decided by

the state court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 24-27 (1983). The usual explanation is that if the suit *must* be based on federal law because that is the only law that such a suit *can* be based on (the standard example is a suit to enforce a collective bargaining agreement, which can be litigated only under federal law), the defendant is entitled to remove and his entitlement should not be defeated by the plaintiff's evasive drafting of the complaint. E.g., *Bartholet v. Reischauer A.G. (Zürich)*, 953 F.2d 1073, 1075 (7th Cir. 1992). It's true that the defendant should be able to defeat this maneuver in state court by moving to dismiss the suit as frivolous; if the plaintiff countered by coming out of his state-law closet and acknowledging that he was trying to plead a federal case, the defendant could then remove. 28 U.S.C. 1446(b). But should the defendant be put to the bother? If as a matter of fact the plaintiff is really intending to bring a federal suit though failing to cite federal law, it can be argued that his intentions should be taken as the reality and so the defendant allowed to remove what is functionally though not formally a federal suit.

The problem comes in setting limits to the doctrine. There are countless cases in which a suit under state law could be thought to be a federal suit in state clothing. Antitrust law, for example, with an isolated exception, *Flood v. Kuhn*, 407 U.S. 258, 284-85 (1972), is a field in which Congress has *not* sought to replace state with federal law. *California v. ARC America Corp.*, 490 U.S. 93, 101-02 (1989). The states are free to enact their own antitrust laws, reaching the same conduct as the federal laws except insofar as the states' power to regulate economic activities in other states is limited by the commerce and due process clauses of the federal Constitution. See Herbert Hovenkamp, "State Antitrust in the Federal Scheme," 58 *Ind. L.J.* 375 (1983). This is a potentially significant qualification, as we shall see; but on the view taken by the defendants in this case, *any* time an antitrust plaintiff brings a suit in state court under a state antitrust statute that

contains substantive provisions similar to that of a federal antitrust statute, the defendant can remove on the ground that the plaintiff is trying to bring a federal antitrust suit yet to insulate it from removal to a federal court.

This surprising possibility gets a boost from a footnote in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). The plaintiffs in that case brought a class suit in a state court under state fraud law and state unfair competition law. The suit was removed to federal district court, properly in the Supreme Court's judgment because the district court had found as a fact that the plaintiffs "had attempted to avoid removal jurisdiction by 'artful[ly]' casting their 'essentially federal law claims' as state law claims." *Id.* at 397 n. 2. The suit had been filed after the district court had dismissed an earlier version, explicitly premised on federal antitrust law, on the basis of a federal defense that, like the "passing on" defense of *Illinois Brick*, the plaintiffs hoped would not be recognized by state law.

It is not easy to see why this is "artful pleading" in some invidious, evasive sense. Once the federal defense was held to block the plaintiffs' federal antitrust claim, their only hope was to proceed under state law. They had little motive to conceal a federal claim in state clothing, for their federal claim was dead. See *In re Application of County Collector*, 96 F.3d 890, 897 (7th Cir. 1996). It is the same here. The only motive the plaintiffs in our Alabama case could have for filing a case under the Alabama statute was to avoid the federal passing-on defense of *Illinois Brick*, a defense they could avoid only if they pressed their claim exclusively under state law—and if they did that the case would belong in state court because, as we have seen, it is not within the diversity jurisdiction and so is not removable to federal court on that basis.

The Supreme Court went on to hold in *Moitie* that the "artfully pleaded" (hence federal) claims that had been removed to federal court were barred by res judicata. The suit had been refiled in state court after final judgment had been entered against the plaintiffs in federal court. We can now see how the

refiling of these suits in state court under state law could be thought "artful pleading" in an invidious sense; and the Court did not say it *was* artful pleading—only that it would not question the district court's finding that it was. The plaintiffs had been trying to dodge a federal court's judgment. The defendants could have set up the judgment as res judicata in the state court in which the suits were refiled. But if the sole basis for filing a state suit is to get around, however temporarily and hopelessly, a federal judgment, it can be argued that the new "state law" suit is really the old federal suit in a transparent guise and that the federal court ought to say so in order to get rid of it quickly and thus protect the federal judgment against the possibility that the state court might abet the plaintiff's effort to get around a dispositive defense or other fatal flaw in his federal case. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911-12 (7th Cir. 1993); *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576, 586 (5th Cir. 1997); *Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412 (9th Cir. 1990). Furthermore, any state claim in *Moitie* had been extinguished by the federal judgment, by operation of the doctrine of merger. Recall that the Court held the claim barred by res judicata. The reason was that the claim could have been joined to the plaintiffs' federal claim and arose from the same cluster of facts. In these circumstances, since it was not joined, it merged into the federal judgment and disappeared, leaving nothing on which to base a suit in state court.

There is no federal judgment here. Neither when the Alabama suit was filed nor when the motion to remand was filed was there any ruling by the district court, let alone a judgment, barring the suit on *Illinois Brick* (or any other federal) grounds. On the contrary, the district court thought *Illinois Brick* not a bar to a federal antitrust suit by indirect purchasers. It is true that the judge had refused to certify the first Alabama suit removed to the district court as a class action, but the denial of class certification is not a final judgment, terminating the underlying suit; the suit continues, only as an individual action rather than as a class action.

The plaintiffs may well be stretching the Alabama statute to the breaking point in seeking damages for nonresident plaintiffs from nonresident defendants who sell primarily in other states. If it were clear that the plaintiffs could get no significant relief under Alabama law, this would strengthen the inference that they were merely recaptioning their federal suit as one under state law. But it is not clear, even though the defendants are able to cite Alabama cases which say that Alabama's antitrust statute is indeed limited to intrastate commerce and it is doubtful that any of the price-fixed sales attacked in the suit took place in intrastate rather than interstate commerce. The cases on which the defendants rely, for example *Georgia Fruit Exchange v. Turnipseed*, 62 So. 542, 546 (Ala. 1913), date from a period in which, interstate commerce being narrowly defined, see, e.g. *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242, 244 (8th Cir. 1906), and federal power to regulate such commerce being deemed exclusive, *id.*; *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895), a state statute limited to intrastate commerce would have some, albeit a strictly limited, scope and could not have a greater scope no matter how much the state wanted it to. The cases thus were not interpreting the statute; they were interpreting the Constitution as placing upper and lower bounds on the reach of the statute, and the Constitution has since been reinterpreted. If the statute is limited today as it once was to commerce that is not within the regulatory power of Congress under the commerce clause, it is a dead letter because there are virtually no sales, in Alabama or anywhere else in the United States, that are intrastate in *that* sense, *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995); *Wickard v. Filburn*, 317 U.S 111 (1942); *United States v. Hicks*, 106 F.3d 187, 189-90 (7th Cir. 1997). Other states read their antitrust statutes to reach what is now understood to be interstate commerce. E.g., *R.E. Spriggs v. Adolph Coors Co.*, 112 Cal. Rptr. 585 (1974); *Health Consultants, Inc. v. Precision Instruments, Inc.*, 527 N.W.2d 596, 607 (Neb. 1995) (citing cases). The reading is constitutionally permissible,

Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964), and we are given no reason to suppose that Alabama would buck this trend and by doing so kill its statute.

A state's power to regulate interstate commerce is limited, however, by the provisions of the federal Constitution that limit the extraterritorial powers of state government. A state cannot regulate sales that take place wholly outside it. *K-S Pharmacies, Inc v. American Home Products Corp.*, 962 F.2d 728, 730 (7th Cir. 1992). State *A* cannot use its antitrust law to make a seller in State *B* charge a lower price to a buyer in *C*. Insofar as the Alabama suit challenges sales from plants or offices in other states to pharmacies in other states, it exceeds the constitutional scope of the Alabama antitrust law. But insofar as it challenges sales from other states to pharmacies in Alabama, it is within the intended and permissible scope of the statute, and, since there may well be a nontrivial number of such sales, the suit has enough potential merit as an Alabama antitrust suit to defeat the application of the "artful pleading" doctrine. The twist that *Moitie* gave to the doctrine is (very uncharacteristically for its author, Justice, now Chief Justice, Rehnquist) based on distrust of state courts, and, especially since it appears only in a footnote, should be narrowly construed in the interest of maintaining comity between the federal government and the states and keeping federal jurisdiction within the limits prescribed by Congress.

But the plaintiffs are wrong to argue that if their suit, if reconceived as a federal suit, is so plainly barred by *Illinois Brick* as to be frivolous, this would mean that it could not be removed to federal court because federal courts lack jurisdiction over frivolous federal claims. It is quite true that a case can be so utterly lacking in merit that the proper disposition of it is dismissal under Rule 12(b)(1) of the civil rules (lack of subject-matter jurisdiction) rather than under Rule 12(b)(6) (failure to state a claim). See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974); *Korzen v. Local Union 705*, 75 F.3d 285, 289 (7th Cir. 1996). But it would be a considerable paradox if, the less merit a claim had, the more opportunity

the plaintiff would have to restart the suit in another court. *Moitie* bars plaintiffs in hopeless federal cases from staving off the evil day of dismissal by shifting the case into a state court that may be confused about or even indifferent to the lack of merit of the case.

Although the issue must be considered a close one because of persisting uncertainty about the estimation of the amount in controversy in injunction cases and about the scope of the doctrine of artful pleading after *Moitie*'s footnote, we conclude that the motion to remand the Alabama suit should have been granted, and we move on to the question whether the wholesalers should have been dropped as defendants. Pretrial discovery included the taking of a thousand depositions and the production of *fifty million* pages of documents, and from this indigestible mass the plaintiffs have plucked a number of tasty morsels to garnish their briefs. We shall not extend this opinion with quotations. Suffice it to say that the record discloses a number of instances in which officers of the defendant wholesalers urge manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledge to adhere to the chargeback system. The defendants argue that each of these "smoking guns" is susceptible of an innocent interpretation. But the issue before us is not whether the wholesalers were in fact participants in the price-fixing conspiracy; it is whether there is sufficient evidence of this to create a jury issue. In deciding this question we must construe the evidence as favorably to the plaintiffs as the record permits, not as favorably to the defendants as it permits. The defendants' interpretations may be correct; they are not inevitable.

But they argue, pointing to *Matsushita* and other decisions by the Supreme Court and this court, that summary judgment for a defendant is proper, even if there is some evidence of an antitrust violation, if the plaintiff's theory of violation makes no economic sense. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451,

467-69 (1992); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 49 (7th Cir. 1992); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986). This has to be the right rule, given the potential for jury confusion in litigation as enormous and esoteric as a billion-dollar antitrust damages action. The wholesalers argue that it would have been contrary to their economic self-interest for them to have joined a conspiracy that prevents them from selling at discounted prices to the pharmacies. The lower the price at which they sell to the pharmacies, the larger their volume of sales, and if their markup is unaffected this will translate into larger gross and probably net revenues.

But this misconceives the plaintiffs' theory of the wholesalers' violation. The theory is that the wholesalers were the manufacturers' cats-paws. There is nothing new about the idea that a cartel might "hire" a customer to help police the cartel. See Elizabeth Granitz & Benjamin Klein, "Monopolization by 'Raising Rivals' Costs': The Standard Oil Case," 39 *J. Law & Econ.* 1 (1996). The theory is especially plausible in the circumstances of the present case. (That doesn't mean it's correct; that's not the issue.) Drug wholesalers appear to be an endangered commercial species. Before the chargeback system was adopted, the manufacturers would often sell directly to hospitals, HMOs, and other favored customers, bypassing the wholesalers, since by selling directly they could monitor each customer's purchases and so try to identify instances in which a customer was purchasing for purposes of arbitrage rather than for its own use. The pharmacies were trying to get into the act by forming buying groups. Buying groups frequently act as their members' wholesaler, buying directly from the manufacturer and thus cutting out independent wholesalers. Desiring a piece of the action with the favored customers, who were proliferating, the wholesalers agreed to implement a chargeback system that would shore up the manufacturers' system of price discrimination, an integral component of the price-fixing conspiracy.

And desiring to discourage buying groups they joined with the manufacturers to hold the line against granting any discounts to such groups and so discourage their formation by reducing the advantages of membership.

The picture that we have just sketched may not be true, but there is enough evidence supporting it to preclude summary judgment; and our main point for the present is merely that the defendants are wrong to argue that it would make no sense for the wholesalers to conspire with them to fix the prices of pharmaceutical drugs. It would make perfectly good sense, and so the "smoking gun" evidence cannot be dismissed as being obviously misunderstood, empty boasting, or idle corporate gossip.

The wholesalers point to their wafer-thin profit margins. The margins might be even thinner if the wholesalers had refused to play their appointed role as agents of a manufacturers' cartel—in fact they might be out of business. And absence of monopoly profits is not inconsistent with monopoly (collusive or single-firm), since firms may transform monopoly profit into costs in their efforts to engross a larger share of them. The wholesalers point to instances in which they did engage in arbitrage, sought permission to give discounts to pharmacies, and even helped to organize buying groups of pharmacies. This evidence does not erase the factual question of whether the wholesalers joined the conspiracy. It is just evidence to be weighed in the balance by the trier of fact. There are inherent strains in a cartel. A member can do better by undercutting the cartel slightly and obtaining enormously increased volume at a slight sacrifice of unit profit than by honoring the cartel price and suffering an erosion of sales because of cheating by less scrupulous members. George J. Stigler, "A Theory of Oligopoly," in Stigler, *The Organization of Industry* 39 (1968). That is why cartels tend to collapse of their own weight. And if as the plaintiffs argue the wholesalers were tools of the manufacturers—reluctant accomplices, yet not the less liable for that, *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n. 6 (1968); *United States v.*

Parke, Davis & Co., 362 U.S. 29, 45 (1960); *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*, 62 F.3d 967, 973 (7th Cir. 1995), *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1163 (7th Cir. 1987), rather than principals—naturally they would be restive. As for the wholesalers' sponsorship of buying groups, it did not begin until after this litigation commenced, and may be strategic. And no significance can be attached to the fact that some of the wholesalers sued the manufacturers. *Illinois Brick* entitles them to do so. One virtue of the rule of that case is that it creates an incentive for middlemen to break out of a cartel and sue the supplier members; it sows dishonor among thieves; they still may *be* thieves.

The last issue is whether the district judge was right to carve DuPont Merck out of the manufacturers' conspiracy. A joint venture of DuPont and Merck, DuPont Merck was formed in 1991, two years after the beginning of the alleged conspiracy (or at least the earliest date within the statute of limitations), to take over DuPont's pharmaceuticals division, DuPont Pharma. Upon its formation, DuPont Merck announced that it was adopting a "single price" policy for DuPont Pharma's drugs, the drugs involved in this suit; it was withdrawing its discounts to hospitals and other favored customers and so abandoning its participation in the chargeback system. This *démarche* may seem irrelevant to whether DuPont Merck should be dismissed from the case. It is conceded to be the successor to DuPont Pharma, so that if DuPont Pharma was violating the Sherman Act between 1989 and 1991, DuPont Merck is liable under standard principles of successor liability even if it cleaned up its predecessor's act upon taking over. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1424-25 (7th Cir. 1993). Moreover, the adoption of a single-price policy by terminating discounts is not the termination of the antitrust violation. The violation is not the discrimination. The discrimination is merely evidence of the violation. A cartel so powerful that it did not have to grant discounts to any customer would not be exonerated from

antitrust liability. All that the withdrawal of discounts would do in such a case would be to create an additional class of plaintiffs.

The significance of the single-price policy lies elsewhere—in DuPont Merck's extraordinary but not improper argument that it thumbed its nose at the manufacturers' cartel because it had sufficient monopoly power on its own to obtain higher profits by a unilateral pricing policy, namely that of giving no discounts to anyone. The proprietary drugs at issue in this case that DuPont Merck makes are only five in number and they include the famous anticoagulant Coumaden, which although its patent has expired is said to have no competition because doctors refuse to prescribe a generic or other substitute. The other four drugs are sufficiently comparable to Coumaden in point of uniqueness, according to DuPont Merck's submission, that it can make more money selling them all without any discounts even though it must lose some sales to the formerly favored customers.

This is not an absurd argument; it may for all we know be entirely sound; it is backed by evidence. But there is enough contrary evidence to preclude summary judgment. Before 1991, but within the period of the statute of limitations, DuPont Pharma had a two-price policy and a chargeback system to implement it, and it participated in the trade association meetings in which, if the plaintiffs' "smoking gun" evidence is credited—as it must be, in the present posture of the case—the conspiracy was hatched or nurtured. The withdrawal of the discounts is evidence that DuPont Merck believed that it had enough unilateral monopoly power to go its own way. But it is not conclusive evidence, and even if it were, it would be consistent with DuPont Pharma's not having shared the belief. We said that DuPont Merck is liable for its predecessor's antitrust violations and here we add that if DuPont Pharma is found to have participated in the conspiracy, DuPont Merck could not avoid liability even for the post-1991 conduct of the conspiracy, a conspiracy in which it was not (or so a jury might find) involved. A mere change of pol-

icy, a mere cessation of involvement, is not effective withdrawal from a conspiracy. To terminate one's liability for the continuing illegal acts of a conspiracy that one had joined, a withdrawing member must either report the conspiracy to the authorities or announce his withdrawal to his coconspirators. *United States v. United States Gypsum Co.*, 438 U.S. 422, 463-65 (1978); *United States v. Patel*, 879 F.2d 292, 294 (7th Cir. 1989); *United States v. Puma*, 937 F.2d 151, 158 (5th Cir. 1991). So far as appears, DuPont Merck did neither.

The four rulings appealed from are thus

REVERSED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

October 20, 1997

Before

Hon. RICHARD A. POSNER, Chief Judge

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,

Nos. 96-2814, 96-2458, 96-2485, and 97-2156

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.
No. 94 C 897
No. 96 C 4323
Charles P. Kocoras, Judge.

The following are before the court:

1. MOTION TO STAY MANDATE PENDING APPLICATION FOR CERTIORARI, filed on October 9, 1997, by counsel for American Home Products Corporation and American Cyanamid Corporation.

2. PLAINTIFFS-APPELLANTS' MEMORANDUM IN OPPOSITION TO MOTION TO STAY MANDATE

PENDING APPLICATION FOR CERTIORARI, filed on October 16, 1997, by counsel for the appellants.

3. RESPONSE OF INDIVIDUAL PLAINTIFFS TO MOTION TO STAY MANDATE PENDING PETITION FOR CERTIORARI, filed on October 16, 1997, by counsel for appellee Rite Aid and appellee Boies/Gravante.

4. MOTION OF THE WHOLESALER-DEFENDANTS-APPELLEES REQUESTING A STAY OF THE COURT'S MANDATE PENDING THEIR PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI, filed on October 15, 1997, by counsel for Wholesaler-Defendant-Appellee AmeriSource Corporation.

5. CLASS PLAINTIFFS' MOTION TO MODIFY THE COURT'S ORDER WITH RESPECT TO THE WHOLESALERS' MOTION TO STAY ISSUANCE OF THE MANDATE, filed on October 17, 1997, by counsel for the class plaintiffs.

The court has determined that further submissions on the pending motions to stay the mandate in these appeals is unnecessary.

IT IS ORDERED that #1 is DENIED.

IT IS FURTHER ORDERED that #4 is DENIED and the mandates in these appeals will issue forthwith.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 94 C 897
96 C 4323

Charles P. Kocoras, Judge.

May 7, 1997

No. 96-8096

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,

PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 USC § 1292(B) NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Before

Hon. RICHARD A. POSNER, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

The following are before the court:

1. PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b), filed on December 26, 1996, by counsel for the petitioners.

2. DEFENDANTS' JOINT ANSWER TO PLAINTIFF'S PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b), filed on January 2, 1997, by counsel.

IT IS ORDERED that the petition for permission to appeal under 28 U.S.C. § 1292(b) is GRANTED. Pursuant to Fed.R.App.P. 5(d), petitioners shall pay the required docketing fee to the clerk of the District Court within ten days of the date of this order.

Counsel for petitioners is ORDERED to notify the clerk of this court when it has tendered the required filing fee to the District Court. The court will then enter this appeal on the court's general docket and set a briefing schedule.

Appendix D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Master File No. 94 C 897

MDL No. 897

IN RE BRAND NAME PRESCRIPTION DRUGS
ANTITRUST LITIGATION

This document relates to:

HUGGINS V. ABBOTT LABS, *et al.*,
CASE NO. 96 C 4323

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This case is before the court on the class plaintiffs' motion for certification for interlocutory appeal. On October 1, 1996, this court issued an order denying the class plaintiffs' motion to remand to the Alabama State court. In that motion, the plaintiffs argued that this court lacked subject-matter jurisdiction over the case because it fails to satisfy the requirements for either diversity jurisdiction or federal question jurisdiction. There were three main issues at the heart of that

prior motion: (1) whether the case presents a federal question; (2) whether there is diversity of citizenship between the parties; and (3) whether the amount-in-controversy requirement of the diversity statute is satisfied. This court found that (1) the case does present a federal question; (2) there is diversity of citizenship; and (3) there is a sufficient amount in controversy. For these reasons, this court held that the case falls within both the federal-question jurisdiction and diversity jurisdiction. The plaintiffs moved to have both issues—federal-question jurisdiction and diversity jurisdiction—certified for interlocutory appeal. For the reasons set forth below, the motion is granted with respect to Parts I.B. and II. of the October 1 Opinion, and denied with respect to Part I.A. of the Opinion.

DISCUSSION

The class plaintiffs seek to have the following issue certified for immediate appeal pursuant to 28 U.S.C. § 1292: Does a federal court have subject-matter jurisdiction over a private antitrust action ostensibly brought under a state antitrust statute, where the statute allows indirect purchasers to recover from those who violate the statute; when the purchasers have no claim under federal law; where the statute has been construed by courts to pertain only to intrastate activity and the defendants are all located outside of that state; in which the statute authorizes a statutory fine as well as the recovery of actual damages; and in which the plaintiffs are a large class consisting of indirect purchasers?

This general description of the issues present may be stated less broadly. The question is whether this case falls within either the court's federal question jurisdiction, or its diversity jurisdiction. This requires the resolution of three separate and distinct sub-issues: (1) whether this case arises "under the Constitution, laws or treaties" of the United States, 28 U.S.C. § 1331; (2) whether there is complete diversity of citizenship in this case; and (3) whether the amount-in-controversy

requirement has been satisfied in this case. The former question determines whether there is federal question jurisdiction; the latter two questions determine whether there is diversity jurisdiction. Of course, if one type of subject-matter jurisdiction is present, the other becomes moot.

As a general proposition, "permission to take an interlocutory appeal should be granted sparingly and with discrimination." *In re Folding Carton Antitrust Litigation*, 75 F.R.D. 727, 738 (N.D. Ill. 1977). Certification is the exception and not the rule. *Zygmuntowicz v. Hospitality Invs.*, 828 F. Supp. 346, 353 (E.D. Pa. 1993). When deciding a motion for certification, the district court must consider the following factors: (1) whether the motion to be appealed involves a controlling question of law; (2) whether there is a substantial ground for difference of opinion on that question of law; and (3) whether an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); *Segni v. Commercial Office of Spain*, 650 F. Supp. 1045, 1046 (N.D. Ill. 1987).

We examine each of the three sub-issues to determine whether these requirements are present. As a preliminary matter, we note that the first requirement for certification—a controlling question of law—is present on each of the three sub-issues. Each may be dispositive on the question of this court's subject-matter jurisdiction, and thus each of a "controlling question of law."

Likewise, we find that the third requirement—material advancement of the ultimate termination of litigation—is also present. If this court has incorrectly determined that it has jurisdiction over the case, there is a risk of entertaining further proceedings, only to be reversed on appeal on the jurisdictional issue. The result of this would be the remand of the case to state court to begin all over. Determining the jurisdictional issues sooner rather than later will reduce this risk of ultimately duplicative proceedings. The Seventh Circuit has expressly recognized the desirability of avoiding a trial (or presumably any proceedings) that "could prove to be a

useless exercise." *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1262 (7th Cir. 1980). Therefore, we find that the third requirement is also present for each of the sub-issues.

Thus, the only question remaining is whether there are substantial grounds for a difference of opinions on each of the three sub-issues. The standard for determining whether there is substantial grounds for difference of opinion is whether there is a "difficult central question of law which is not settled by controlling authority." *In re Heddendorf*, 263 F.2d 887, 889 (1st Cir. 1959). It must be demonstrated that a "substantial likelihood" exists that the district court ruling will be reversed on appeal. We consider the sub-issues separately.

I. Federal Question Jurisdiction

In the original order, this court held that the case falls within our federal question jurisdiction, because the Alabama state statute applies only to intrastate activity, and the bulk of the activity complained of occurred outside of Alabama. Therefore, we found, any claim asserted must be, at its heart, a federal claim, and thus we found that the plaintiffs' claim, though facially a state claim, was in fact an "artfully pleaded" federal claim. Plaintiffs argue that, under *Illinois Brick*, no federal claim exists, and thus if any valid claim exists under the statute, that claim could only be a state claim.

In essence, the October 1 opinion of this court found that plaintiffs did not have a valid state law claim because of the claim's focus on interstate activity. The plaintiffs argue (almost certainly correctly) that they do not have a valid federal law claim, because *Illinois Brick* bars most suits by indirect purchasers under federal law, and because these plaintiffs do not fall within any of the exceptions to *Illinois Brick*. The question, then, is whether federal jurisdiction exists over such a claim. The courts are split on this very issue.

This court found that, in such a situation, the fact that the plaintiffs' claim could not have existed under state law meant that it was an artfully pleaded federal claim. *See* Memorandum Opinion, dated October 1, 1996, at 17-20 (hereinafter

"Opinion"). Other courts have reached the same conclusion, often in identical situations arising from the same or similar state statutes. *See In re NASDAQ Market Makers Antitrust Litigation*, 929 F. Supp. 174, 178 (S.D.N.Y. 1996); *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79, 82 (E.D.N.Y. 1980). These cases suggest that a district court should look beyond the face of the allegations to determine if there is a colorable state claim.

However, a number of other courts have reached the opposite conclusion in similar situations. *See, e.g., Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 479-80 (9th Cir. 1990); *In re Sugar Antitrust Litigation*, 588 F.2d 1270, 1272-74 (9th Cir. 1978) (Merrin, C.J.), *cert. denied sub nom. California and Hawaiian Sugar Co. v. California*, 441 U.S. 932 (1979); *In re Citric Acid Antitrust Litigation*, 1996 WL 116827, at *5-6 (N.D. Cal. March 12, 1996); *Blake v. Abbott Laboratories, Inc.*, 894 F. Supp. 327, 329-330 (E.D. Tenn. 1995); *Four Way Plant Farm, Inc. v. NCCL*, 894 F. Supp. 1538, 1542-43 (M.D. Ala. 1995). These courts generally have found that if there is no federal claim, the case should be remanded, regardless of the merits (or lack thereof) of the state claim.

The Seventh Circuit has recently indicated that the artful pleading doctrine should not be invoked in situations where there is no colorable federal claim. *See In re Application of County Collector*, 96 F.3d 890, 896-97 (7th Cir. 1996). The facts in *County Collector* are quite different from those here, most notably in that the state claim there was not without merit. Nevertheless, the narrow view of the artful pleading doctrine taken by the Seventh Circuit also lends to the uncertainty on this question.

In light of the split in decisions on this issue, we find that there is substantial grounds for difference of opinion on the question of whether this claim falls within the district court's federal-question jurisdiction.

II. Diversity of Citizenship Among the Parties

Although the case was brought in the Alabama state court as a class action, the plaintiffs in a similar state law case in Maine were added as intervenors in this case by the Alabama state court. The addition of the Maine plaintiffs was a naked attempt to evade diversity jurisdiction, as one of the defendants is a Maine corporation. The case was then removed to federal court in Alabama before being transferred to the Judicial Panel on Multidistrict Litigation (the "JPML"), and then to this court. In this court's October 1 opinion, we held that there was complete diversity of citizenship among the parties, because in class actions, only the class representatives need be diverse from the defendants. The plaintiffs now argue that there is not diversity among the parties, because the Maine intervenor-plaintiffs should be treated as parties for diversity purposes. Defendants, of course, disagree.

We do not find any substantial grounds for disagreement on this issue. The law is clear that a non-diverse intervenor's presence in a case will not destroy diversity unless the intervenor "was an indispensable party at the time the case was filed." *Costain Coal Holdings, Inc. v. Resources Inv. Corp.*, 15 F.3d 733, 734 (7th Cir. 1994); *American Nat'l Bank & Trust v. Bailey*, 750 F.2d 577, 582 (7th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985). The Maine intervenor-plaintiffs were not indispensable parties at the time the suit was filed, because they were not necessary for the Alabama case to proceed, and they were protecting their own interests in a similar Maine case. *See* Fed. R. Civ. P. 19(b). Therefore, the presence of the non-diverse, non-indispensable Maine intervenor plaintiffs should not deprive this court of diversity jurisdiction.

The plaintiffs' primary argument against this reasoning is that the determination of diversity in a class action should include all "named parties," including intervenors, and not only the class representatives. Moreover, they argue that the rule excluding the citizenship of non-indispensable intervenors from consideration of diversity is inapplicable here.

Plaintiffs argue that this rule is intended to apply to intervenors who attempt to intervene *after* a court has already asserted its diversity jurisdiction over a case. In contrast, they argue, where the intervenors were added by a state court prior to removal, so that they were already in the case at the time the court was required to determine whether it had subject-matter jurisdiction over the matter, the intervenors should be included in the determination of whether there is complete diversity. The only authorities to which the plaintiffs cite are examples of the cases holding that only the citizenship of "named parties" is to be considered for diversity purposes in class action.

We are not persuaded that there is a substantial grounds for a difference of opinion on this issue. There is little authority that is directly on point, because the arguments raise a rather unique question—whether there is a difference between the "named parties" and the class representatives. Indeed, the cases seem to use the terms interchangeably. In *Snyder v. Harris*, the Supreme Court stated that diversity was required between "named parties" and "named defendants." *Snyder v. Harris*, 394 U.S. 332, 340 (1969). However, for this proposition, the Court cited *Supreme Tribe of Ben-Hur v. Cauble*, in which the Court held that diversity of citizenship existed where certain non-diverse plaintiffs "were of the class represented." *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921). Other cases also indicate that courts use the terms "named parties" and "class representative" interchangeably. *See, e.g., In Re School Asbestos Litigation*, 921 F.2d 1310, 1317 (3d Cir. 1990), *cert. denied sub nom. U.S. Gypsum v. Barnwell School Dist. No. 45*, 499 U.S. 976 (1991) ("named class representatives"); *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1129 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975) ("representative plaintiffs"); *Friedman v. Meyers*, 482 F.2d 435, 436 n.1 (2d Cir. 1973) ("named representatives"); *Weinberg v. Sprint Corp.*, 165 F.R.D. 431, 440 (D.N.J. 1996) ("named class representatives"); *U.S. Trust Co. of New York v. Alpert*, 163 F.R.D. 409, 416 n.8 (S.D.N.Y. 1995) (Wood, J.)

("representative parties"). These courts apparently were not contemplating the novel argument that there is a distinction between the two terms.

To the extent that there may be a difference in the scope of the two terms (an unlikely scenario), it seems clear that it is the class representatives that are to be considered for diversity purposes. For instance, Rule 23 refers only to "representatives," and not to "named parties." *See* Fed. R. Civ. P. 23. It is undisputed that the Maine intervenors are not class representatives in this case. It seems clear that the requirements for diversity—between the class representatives and the defendants—are present here. Plaintiffs cite no authority for an exception to this rule, nor do they present any compelling arguments on behalf of such an exception. Therefore, we find no substantial grounds for difference of opinion on the question of diversity of citizenship.

III. Amount-in-Controversy

The final question is whether the amount-in-controversy requirement of the diversity statute is satisfied. The diversity statute requires that "the matter in controversy exceed[ ] the sum or value of $50,000." 28 U.S.C. § 1332. The Seventh Circuit has held that the Judicial Improvements Act, 28 U.S.C. § 1367, overturned the long-standing rule that in class actions, each class member must satisfy the jurisdictional amount requirement. *See Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-31 (7th Cir. 1996) (holding that § 1367 overruled *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973)). The court held that it is now sufficient for jurisdictional purposes if only the class representatives satisfy the amount-in-controversy requirement; the class members then fall within the court's supplemental jurisdiction. *Id.* Of course, the class members' damages cannot be aggregated to meet the jurisdictional amount. *E.g., Snyder v. Harris*, 394 U.S. 332, 335 (1969). Therefore, the question is whether the individual class representatives satisfy the amount-in-controversy requirement.

The plaintiffs are seeking damages of four types: compensatory damages, statutory penalties, injunctive relief, and attorneys' fees. We found that the key question was whether the statutory violations might rise to the required level; the other categories were negligible. The compensatory damages (as allowed under the Alabama statute) will be the amount of supercompetitive profits received from any single indirect-purchaser, and as such seem certain to be quite small. Opinion at 10-11. The injunctive relief is calculated on a per-class member basis, and thus are negligible. Opinion at 14. The attorneys' fees are not considered for jurisdictional purposes, because this is a "common fund" case. Opinion at 15 (citing *In re Amino Acid Lysine Antitrust Litigation*, 918 F. Supp. 1181, 1188 (N.D. Ill. 1996)).

Therefore, the sole remaining category of damages is the statutory penalties. The Alabama statute provides that, in addition to compensatory damages, a plaintiff may recover $500 for "each instance of such injury or damage." Ala. Code § 6-5-60(a). As to whether the statutory penalties rise to the jurisdictional level, this court made two findings. First, we held that the penalties should be treated as a form of punitive damages. *See* Opinion at 11. Second, in the absence of controlling law in this circuit, we followed the law of the Fifth and Eleventh Circuits, holding that punitive damages should be aggregated for jurisdictional purposes in class actions. *See* Opinion at 13 (citing *Tapacott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996) and *Allen v. R. & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995)).

The Plaintiffs argue that the damages sought in this case do not rise to the jurisdictional amount. Their first argument is that they do not seek the statutory penalties in their complaint. The complaint clearly contradicts this argument, as the plaintiffs note that the statute provides for a $500 penalty (Complaint at ¶ 1), and in their "prayer for relief," seek the award of "any damages allowed by law." (Complaint at ¶ C). This must be interpreted to include statutory penalties. Nevertheless, the plaintiffs make a number of other arguments, dif-

fering with the court's findings as to both the treatment of the penalties as punitive damages, and to our decision to follow the *Tapscott* rule.

The plaintiffs are correct that there is no clear law on either question. While no court in this circuit has ruled on the question of aggregating punitive damages, other courts have differed. *Compare Tapscott*, 77 F.3d at 1358; *Allen*, 63 F.3d at 1333; *Duhon v. Conoco, Inc.*, 937 F. Supp. 1216, 1219-20 (D. La. 1996); *Earnest v. General Motors Corp.*, 923 F. Supp. 1469, 1472 (N.D. Ala. 1996); *and Gilmer v. The Walt Disney Co.*, 915 F. Supp. 1001, 1013-14 (W.D. Ar. 1996) *with McGowan v. Cadbury Schweppes, PLC*, 941 F. Supp. 344, 347 (S.D.N.Y. 1996); *Bishop v. General Motors Corp.*, 925 F. Supp. 294, 297-99 (D.N.J. 1996); *Haisch v. Allstate Ins. Co.*, ___ F. Supp. ___, 1996 WL 617339, at *5-7 (D. Ariz. Oct. 22, 1996); *Garcia v. General Motors Corp.*, 910 F. Supp. 160, 166 (D.N.J. 1995); *Visintine v. Saab Auto, A.B.*, 891 F. Supp. 496, 498 (E.D. Mo. 1995); *Smiley v. Citibank, N.A.*, 863 F. Supp. 1156, 1163 (C.D. Cal. 1993); *and Kasky v. Perrier Group of America, Inc.*, 1991 WL 577038, at *2 (S.D. Cal. Sept. 16, 1991).

There appears to be a dearth of authority on the former question regarding the treatment of statutory penalties as well. It is the opinion of this court that the penalties serve the same purpose as punitive damages, and thus should be treated analogously. *See* Opinion at 11. A district court in California has held that an award of treble damages, pursuant to a state statute, should not be treated as punitive damages, because while punitive in nature, the state statute "gives plaintiffs a specific right to [the treble] damages." *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 718 (C.D. Cal. 1995). The same reasoning might apply to the statutory penalties under the Alabama statute. In light of these different cases, we find that there is substantial ground for a difference of opinion on the question of the amount-in-controversy.

We have held that there is subject-matter jurisdiction over this case. However, the possibility of extensive proceedings

in this court, followed by a reversal by the Court of Appeals on the jurisdictional question, leads us to tread carefully in this area. Therefore, we find that the requirements of § 1292(b) are satisfied with respect to the questions of federal question jurisdiction and the amount in controversy, but not with respect to the question of diversity of citizenship.

CONCLUSION

For the reasons stated above, the plaintiffs' motion to certify this court's Opinion dated October 1, 1996 is granted with respect to Parts I.B. and II. of the Opinion, and denied with respect to Part I.A. of the Opinion.

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
United States District Judge

Dated: December 16, 1996

Appendix E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Master File No. 94 C 897
MDL 997

IN RE: BRAND NAME PRESCRIPTION DRUGS
ANTITRUST LITIGATION

This Document Relates to:
HUGGINS v. ABBOTT LABS. et al.

Case No. 96 C 4323

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This case comes before the court on certain plaintiffs' motion to remand for lack of subject matter jurisdiction. The motion was filed by the class plaintiffs in a related Alabama consumer action entitled *Robert Huggins, on behalf of himself and all others similarly situated, v. Abbott Laboratories, et al.* For the reasons set forth below, the class plaintiffs' motion for remand is denied.

BACKGROUND

Plaintiff Robert A. Huggins, a citizen of Alabama, filed this action in the Circuit Court of Clarke County, Alabama on January 26, 1996. The complaint alleged that the defendants conspired to restrain trade in the market of, and fix the prices of, brand-name prescription drugs.[1] (Complaint at ¶ 2.) The sole count of the complaint was brought under the principal Alabama antitrust statute, Ala. Code § 6-5-60, which gives both direct and indirect purchasers the right to bring suit against those who violate the statute. (*Id.* at ¶¶ 1, 81.) The suit was filed on behalf of Huggins and other indirect consumer purchasers, located both in Alabama and in other jurisdictions which have similar indirect purchaser statutes. (These jurisdictions are the District of Columbia, Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico, and Wisconsin.) (*Id.* at ¶ 47.)

After filing this action, Huggins obtained an order from the Clarke County Circuit Court conditionally certifying the class. (Defendants claim that this certification was obtained *ex parte*.) The complaint and the conditional certification were then served on the defendants. At the same time, a similar lawsuit was pending in Maine state court between a group of indirect-purchaser plaintiffs in Maine and several drug manufacturer defendants. On February 16, two of the plaintiffs in the Maine action filed a motion in the Clarke County, Alabama court seeking leave to intervene in the Huggins case. The Alabama court granted this motion on February 23. Defendants removed this action on February 29, 1996 to the United States District Court for the Southern District of Alabama. On March 22, 1996, Chief Judge Butler of the Southern District of Alabama stayed all proceedings in the case, including the plaintiffs' motion to remand, pending a ruling by the Judicial Panel on Multidistrict Litigation ("the

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[1] The defendants named were 23 drug manufacturers. For reasons that are discussed below, it is significant that one of the defendants, American Cyanamid Company, is a Maine corporation.

JPML") on whether the case should be transferred to this court. The JPML did transfer the case to this court.

It should be noted preliminarily that this case is similar to another referred by the JPML and pending before this court, *Price v. American Home Products, et al.*, 94 C 897 (N.D. Ill.). The *Price* case was filed in state court in April, 1994 by two indirect purchasers of brand-name prescription drugs against seven drug manufacturers. The claim was based on the same Alabama antitrust statute at issue in the Huggins plaintiffs' action. The defendants timely removed the case to federal court (the United States District Court for the Middle District of Alabama) based upon diversity jurisdiction. The district court for the Middle District then referred the case to the JPML, which referred it to this court. The *Price* plaintiffs did not move to remand the case to state court, and instead proceeded to litigate the case. In November, 1994, this court denied the *Price* plaintiffs' motion for class certification. Subsequent to that ruling, in December. 1994, the *Price* plaintiffs filed a motion to dismiss the case or remand it to state court, pursuant to Fed. R. Civ. P. 12(b)(1), alleging that the amount-in-controversy requirement of the diversity statute was not satisfied. This court denied the motion, finding that, by not contesting removal when the motion was originally made, the plaintiffs conceded that their claims exceeded the amount-in-controversy requirement. *See generally In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 56615 (N.D. Ill. February 8, 1995).

On July 31, 1996, the *Huggins* plaintiffs filed a motion to remand for lack of subject matter jurisdiction. The defendants have opposed this motion.

LEGAL STANDARD

Under 28 U.S.C. § 1441, a defendant may remove an action from state court to federal court if the federal court would have had jurisdiction over the lawsuit as originally filed by the plaintiff. Under § 1447(c), however, the action may be

remanded to state court if it appears that the district court lacks subject matter jurisdiction. The burden of establishing federal jurisdiction rests on the party seeking to preserve removal. *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir. 1993). Courts should interpret the removal statute narrowly and presume that the plaintiff may choose his or her forum. *Doe v. Allied-Signal Inc.*, 985 F.2d 908, 911 (7th Cir. 1993). Any doubts regarding jurisdiction should be resolved in favor of remanding the action to state court. *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir. 1976).

DISCUSSION

As stated above, the defendants, as the parties seeking to preserve removal, have the burden of demonstrating that this court does have subject matter jurisdiction. Defendants argue that this case falls within both the diversity and federal-question jurisdiction of this court. We examine these arguments separately.

I. Diversity Jurisdiction

Defendants first argue that this case falls within the diversity jurisdiction of this court, 28 U.S.C. § 1332. Under § 1332, two elements must be present: complete diversity of the parties and an amount in controversy in excess of $50,000. *See* 28 U.S.C. § 1332.

A. Diversity of Citizenship

The defendants argue first that there is diversity of citizenship in this case. The diversity jurisdiction statute provides federal jurisdiction for cases arising between citizens of different states. *See* 28 U.S.C. § 1332. There must be complete diversity—that is, no plaintiff may be a citizen of the same state as any defendant. *E.g., Krueger v. Cartwright*, 996 F.2d 928, 931 (7th Cir. 1993). However, this rule is amended slightly in class actions between a plaintiff class and multiple

defendants. In such cases, there need not be diversity between each class member and each of the defendants. Rather, there need only be complete diversity between each of the class representatives and each defendant. *E.g., Snyder v. Harris*, 394 U.S. 332, 340 (1969); *In re School Asbestos Litigation*, 921 F.2d 1310, 1317 (3d Cir. 1990), *cert. denied sub nom. U.S. Gypsum Co. v. Barnwell Sch. Dist. No. 45*, 499 U.S. 976 (1991); *F. & H.R. Farman-Farmaian Cons. Eng. v. Harza Eng. Co.*, 882 F.2d 281, 284 (7th Cir. 1989). *cert. denied*, 497 U.S. 1038 (1990).

There is no dispute but that there is complete diversity between the sole class representative and the defendants in this case: the class representative, Robert Huggins, is a citizen of Alabama; the same cannot be said of any defendant. However, the plaintiffs make an interesting argument. They assert that there is not complete diversity here because the two intervenors are citizens of the same state as one of the defendants. The intervenors are citizens of Maine, and one defendant (American Cyanamid) is incorporated in Maine, and therefore is considered a citizen of Maine for diversity purposes. *See* 28 U.S.C. § 1332(c).

This argument is ultimately unpersuasive. The plaintiffs do not cite to any authority to support their argument. They cite two cases which stand for the unremarkable proposition that "[w]hen a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party." *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1993) (quoting *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985)); *Schneider*, 767 F.2d at 1017. Neither relates to class actions or to diversity jurisdiction. The third case is closer to the present issue: it holds that an intervenor is treated as a real party for purposes of diversity jurisdiction, and that the intervenor's presence may destroy diversity. *See Farm Bureau Mut. Ins. Co. v. Eighmy*, 849 F. Supp. 40, 42-43 (D. Kan. 1994). However, there are two problems with the plaintiffs' reliance on this case. First, it does not on its face apply to class actions; thus it is not

clear if it disturbs the well-settled rule that, in a class action, there need only be complete diversity between the class representatives and the defendants. Second, and more importantly, the plaintiffs' position is contrary to the settled law of this circuit and others that where a non-diverse party intervenes in a case, that party's presence will not deprive the court of diversity jurisdiction unless "the intervenor was an indispensable party at the time the case was filed." *Costain Coal Holdings, Inc. v. Resource Inv. Corp.*, 15 F.3d 733, 734 (7th Cir. 1994); *St. Paul Fire & Marine Ins. Co. v. Helena Marine Serv.*, 884 F.2d 391, 392-93 (8th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Dean v. Holiday Inns, Inc.*, 860 F.2d 670, 672 (6th Cir. 1988); *American Nat'l Bank & Trust v. Bailey*, 750 F.2d 577, 582 (7th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985). It is clear that the Maine intervenors were not indispensable parties at the time this case was filed in Alabama, since there was no danger to the Alabama parties or the Maine intervenors of prejudice due to the intervenors' absence. They were unnecessary for the resolution of the Alabama case, and were already protecting their own interests in the Maine case. *See* Fed. R. Civ. P. 19(b). Therefore, the presence of the intervenors would not destroy diversity in this case. even if were not a class action. The fact that it is a class action only makes this conclusion more inescapable.

Defendants make a number of other arguments in support of their position that there is diversity of citizenship. These arguments are superfluous in light of the above conclusion.

B. Jurisdictional Amount

Defendants also argue that the amount-in-controversy requirement of the diversity statute is satisfied. The diversity statute requires that the "amount in controversy" exceed $50,000. *See* 28 U.S.C. § 1332(a). The burden rests on the defendant in a removal action to prove by a preponderance of the evidence that the amount-in-controversy requirement is satisfied. *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir. 1993). In determining whether diversity jurisdiction

exists, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). "It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *Id.* The plaintiffs have alleged in their complaint that no class member's damages exceed $50,000.

It is well-settled that in class actions, class members may not aggregate their claims in order to meet the jurisdictional amount. *See, e.g., Snyder v. Harris*, 394 U.S. 332, 335 (1969). However, there are certain exceptions to this rule, which are discussed below. Moreover, the Seventh Circuit has recently decided to follow the Fifth Circuit's ruling that it is sufficient for jurisdictional purposes if the class representatives meet the jurisdictional amount; the claims of individual class members may fail to meet the jurisdictional amount while still falling within the court's supplemental jurisdiction. *See Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-31 (7th Cir. 1996); *In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995). This is the result of the Judicial Improvements Act of 1990, 28 U.S.C. § 1367, which the Seventh Circuit found to overrule the long-standing rule that each member of the class must claim at least the jurisdictional amount. *See Stromberg Metal Works*, 77 F.3d at 930-31 (finding that § 1367 overruled *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973)).

The remedies sought by the plaintiffs fall into four categories: compensatory damages, statutory penalties, injunctive relief, and attorney's fees. Following *Stromberg*, we must examine each to determine whether the jurisdictional amount is satisfied.

1. Compensatory Damages

Under the Alabama statute, plaintiffs are entitled to compensatory damages for any violations thereof. *See* Ala. Code 6-5-60(a). It is well-settled that class members' compensatory damages are not aggregated in determining whether the juris-

dictional amount is satisfied. *Snyder*, 394 U.S. at 335. Therefore, we look only at the class representative's compensatory damages. Both sides seem to agree that these damages will be quite small, and devote their energy to contesting the other areas. That seems to be appropriate. The statute allows plaintiffs to recover for "actual damages," which are presumably the extent to which the defendants' alleged anticompetitive conduct harmed the plaintiff. This appears to be the extent to which the defendants' profits were "supercompetitive"—that is, the amount of defendants' profits that were derived as a result of the artificially high prices they are alleged to have charged as a result of their collusive activity. *See American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1319 (7th Cir. 1991) ("supercompetitive" price is that charged above the competitive price as a result of illegal conduct); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1452 n.23 (11th Cir. 1991) ("supercompetitive" profits are "profits earned in comparison to what would be earned if the market operated without illegal restrictions . . ."); Richard A. Posner, *Antitrust Law* 224 (1976) ("[i]n price-fixing cases the courts have used as their measure of cost the difference between the competitive and collusive price, multiplied by the number of units sold at the collusive price during the relevant time period"). While this determination is admittedly speculative, it seems certain that the supercompetitive profits derived from any individual plaintiff would be minimal.

2. Statutory Penalties

The statute also provides a penalty for its violation, providing that "in each instance of such injury or damage, [a plaintiff may] recover the sum of $500" in addition to actual damages. Ala. Code § 6-5-60(a). Plaintiffs here would be entitled to recover this penalty if successful in their suit.

The first issue to arise is whether we should treat this penalty as a form of punitive damages. We are persuaded that we should. Like punitive damages, the plaintiff is awarded the penalty in addition to the actual (or compensatory) damages.

Moreover, the purpose of the penalty, like that of punitive damages, appears to be penal and punitive, as part of an effort to deter the type of conduct forbidden by the statute. Therefore, we treat the penalty as we would punitive damages.

This raises the question of whether punitive damages (and the statutory penalties in this case) available to a plaintiff class are considered in the aggregate or per class member for jurisdictional purposes. The courts do not agree on this question. The confusion has come as a result of the Supreme Court's holding that damages in any form are to be aggregated for jurisdictional purposes only where the plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest," but that damages are not to be aggregated where the plaintiffs' claims are "separate and distinct." *Snyder*, 394 U.S. at 335. The Eleventh Circuit has interpreted this to require that, under Alabama law, punitive damages be aggregated when they "reflect the defendant's course of conduct towards all of the putative class members," including in mass tort actions. *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996); *see also, Earnest v. General Motors Corp.*, 923 F. Supp. 1469, 1472 (N.D. Ala. 1996) (applying *Tapscott* in class action). The *Tapscott* court relied on the fact that punitive damages exist to punish the defendant and thus serve the interests of the state, not the individual plaintiff. *Id.* Therefore, it found, each plaintiff has an undivided interest in the total amount of punitive damages. *Id.* The Fifth Circuit has reached a similar conclusion in applying Mississippi law, finding that punitive damages are "fundamentally cumulative." *See Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995).

A number of district courts have reached the opposite conclusion. One district court has concluded that this is a misapplication of the "common and undivided interest" doctrine. *See Bishop v. General Motors Corp.*, 925 F. Supp. 294, 297-99 (D.N.J. 1996). The court held that the doctrine should apply in cases "that cannot be adjudicated without implicating the rights of everyone involved in the res"—cases which

involve a single indivisible res such as a piece of property or an insurance policy. *Id.* Unlike these examples, it noted, individual plaintiffs can sue for punitive damages, and the rights of subsequent plaintiffs are not affected, regardless of whether the plaintiff prevails. *Id.* For these reasons, it rejected *Tapscott*. Another district court has reached the same conclusion, finding that class members seeking punitive damages are not "seeking to enforce a single title or right in which [they] have a common and undivided interest where . . . they do not have such an interest in the underlying actual damages. Rather, their claims for punitive damages are as separate and distinct as their claims for actual damages." *Visintine v. Saab Auto, A.B.*, 891 F. Supp. 496, 498 (E.D. Mo.1995). Finally, another District of New Jersey court has held simply that "[p]unitive damages cannot be aggregated to satisfy the jurisdictional amount." *Garcia v. General Motors Corp.*, 910 F. Supp. 160, 166 (D.N.J. 1995).

We think that *Tapscott* offers the better approach. Under Alabama (and other states') law, punitive damages are not a matter of right for the individual plaintiffs. They are provided for under state law in order to serve the state's interest by deterring unlawful conduct. Under this rule, damages based on the "wrongfulness of the defendant's course of conduct as a whole" and "toward all of the putative class members," which are designed to "deter wrongful conduct and punish those responsible," are considered in the aggregate. *Tapscott*, 77 F.3d at 1359. The fact that the *distribution* of damages (the statutory penalties) is based on a formula in the statute—$500 per instance of injury—does not alter this conclusion. The amount of the award is still determined by the egregiousness of the defendants' conduct toward the class of consumers when taken as a whole. Therefore, we find that the amount of statutory penalties should be considered in the aggregate.

In light of this conclusion, it is clear that the amount-in-controversy requirement is satisfied. If plaintiffs may seek $500 per violation, and the class includes indirect buyers of

brand-name prescription drugs in eight states and the District of Columbia, there is quite clearly more than $50,000 in controversy.

3. Injunctive Relief

Plaintiffs also seek an injunction requiring defendants to cease any illegal price-fixing. However, this does not add to the amount-in-controversy. We follow the lead of the Third Circuit and Judge Shadur of this district in their holding on this point. "In a diversity-based class action seeking primarily money damages, allowing the amount in controversy to be measured by the defendants' cost would eviscerate *Snyder*'s holding that the claims of class members may not be aggregated in order to meet the jurisdictional threshold." *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir.), *cert. denied sub nom. Upp v. Mellon Bank, N.A.*, 510 U.S. 964 (1993), *quoted in In re Amino Acid Lysine Antitrust Litigation*, 918 F. Supp. 1181, 1188 (N.D.Ill.1996) (citations omitted). Accordingly, we consider only the value to each individual claimant of the sought-after injunction, and find it is negligible.

4. Attorneys' Fees

Plaintiffs also seek attorneys' fees. However, these do not add to the amount in controversy because this is a "common fund" case. In such cases, the attorneys' fees come out of, rather than in addition to, the plaintiffs' recovery. *Skelton v. General Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). In common fund cases, attorneys' fees do not add anything to the amount in controversy. *In re Lysine*, 918 F. Supp. at 1187.

As a result, we find that the requirements of the diversity statute are satisfied. There is complete diversity of citizenship, and the defendants have shown a likelihood that the statutory penalties, if proper, would exceed the jurisdictional amount.

II. Federal Question Jurisdiction

Defendants argue that this case falls within the federal question jurisdiction of this court, 28 U.S.C. § 1331. Although the plaintiffs raise only state law claims in their complaint, defendants argue that the complaint falls within the "artfully pleaded claim" exception, that the claim is an attempt to avoid a prior judgment by this court, and that the claim is an attempt to bind out-of-state (non-Alabama) plaintiffs, thus raising questions of federal constitutional law.

In order to fall within the courts' federal-question jurisdiction, a complaint must present a federal question on its face. *E.g.*, *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Id.* (citations omitted). A case does not fall within federal-question jurisdiction by virtue of a defense arising from federal law; the well-pleaded complaint must provide the basis for the courts' jurisdiction. *E.g.*, *Louisville N. & R. v. Mottley*, 211 U.S. 149, 152 (1908).

There is an exception to the "well-pleaded complaint rule": the "artful pleading" doctrine. *See, e.g., In re NASDAQ Market Makers Antitrust Litigation*, 929 F. Supp. 174, 178 (S.D.N.Y. 1996). This doctrine provides that the courts "will not permit [a] plaintiff to use artful pleading to close off [a] defendant's right to a federal forum." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 n.2 (1981). Courts must seek "to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Id.* This doctrine has been invoked where "the elements of the claim are virtually identical to those of a claim expressly grounded on federal law." *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 760 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986).

Defendants argue that the plaintiffs' claims fall within this exception because, while on the surface alleging a violation of only the Alabama state antitrust statute (Ala. Code § 6-5-60), the complaint in truth alleges a violation of federal law. The defendants note correctly that the vast majority of activities at issue in plaintiffs' claim took place outside of Alabama, and that the activity is thus interstate in nature. (The defendants are not located in Alabama, the products were not manufactured there, no agreement is alleged to have been reached there, and many of the plaintiffs live elsewhere.) Therefore, the defendants argue, the plaintiffs' allegations center on interstate activity, which is beyond the scope of the Alabama statute. As a result, they say, the complaint may really only state a claim under federal antitrust law.

The artful pleading doctrine has arisen with some frequency in cases involving claims brought under state antitrust statutes, including the Alabama statute at issue here. These instances often arise in the context of Multidistrict Litigation as well. In a Multidistrict antitrust case in which the plaintiffs brought a claim under a South Carolina antitrust statute, Judge Weinstein noted:

> "A federal court need not blind itself to the real gravamen of a claim because plaintiff tenders a blindfold in the form of artificial characterizations in its complaint. Peeking to determine reality is particularly appropriate where it is apparent that the central federal claim is inseparable from the state law theory, and where the question of federal jurisdiction turns on the out-of-state status of the parties and the interstate nature of transactions complained of."

In re Wiring Device Antitrust Litigation, 498 F. Supp. 79, 82 (E.D.N.Y. 1980) (citations omitted). Likewise, we must examine the nature of plaintiffs' claims to determine whether they constitute an attempt to state a claim under federal law while avoiding federal jurisdiction.

In short, they do. Plaintiffs are asserting a claim against drug manufacturers, all of whom are located outside of the state of Alabama. The vast majority of the conduct at issue in the claim took place outside of the state. Even the majority of the plaintiff class, and the intervenors, are located outside of Alabama. This is a case that pits the entire brand-name prescription drug industry against the entire class of brand-name prescription drug purchasers in eight states and the District of Columbia. This is most certainly interstate, rather than intrastate, activity. Therefore, we find that the plaintiff's claims properly arise under the federal antitrust law.

The narrow scope of the Alabama statute also leads to this conclusion. It is clear that the statute applies only to intrastate activity. *See Warren v. Playmobil U.S.A., Inc.*, CV 95-B-1591-S (N.D. Ala. Mar. 19, 1996) (citing *Georgia Fruit Exch. v. Turnipseed*, 62 So. 542, 546 (Ala. Ct. App. 1913)); *In re NASDAQ Market Makers Antitrust Litigation*, 929 F. Supp. 174, 179 (S.D.N.Y. 1996). The conduct at issue in this case is almost entirely interstate in nature, and thus is beyond the scope of the Alabama statute.

This question is similar to that in the *Wiring Device* litigation. In a case referred by the JPML, the plaintiff brought suit under a South Carolina antitrust statute for activity that was almost totally interstate in nature, despite the fact that the South Carolina courts had construed the statute as applying only to intrastate commerce. In denying the plaintiff's motion to remand, Judge Weinstein held that "[w]here, as here, all defendants are unquestionably engaged in interstate commerce, those who are damaged from an alleged restraint of trade find a remedy in the federal, not the state, antitrust laws." *In re Wiring Device*, 498 F. Supp. at 82. He also found that this conclusion was buttressed by the fact that the state statute applied only to intrastate commerce. *Id.* at 83.

In the *NASDAQ* litigation, the plaintiffs had filed suit under the same Alabama antitrust statute at issue in the present case. The defendants removed the case, which was referred by the JPML to the Southern District of New York, and the plaintiffs

filed a motion to remand. The court found that the Alabama statute covers only intrastate commerce, and that the complaint contained essentially the same allegations as the federal claims referred by the JPML, except that it alleged only state law violations. *In re NASDAQ*, 929 F. Supp. at 179. The court noted the similarities to *Wiring Device*, and relied on it in finding that the state law claims fell within the artful pleading exception, because they constituted an attempt to state a federal claim under a state statute. *In re NASDAQ*, at 179-80.

Like these cases, we are faced with a class of plaintiffs who are asserting state antitrust claims which (1) arise out of interstate conduct and (2) are asserted against out-of-state defendants. Each of these cases has involved a statute that has been construed to apply only to intrastate activity. The present case is different in one way: not only are all of the defendants located out-of-state, but many of the plaintiffs are as well. Therefore, we follow these courts in finding that the complaint raises a federal question.

CONCLUSION

For the reasons set forth above, the plaintiffs' motion to, remand is denied.

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
United States District Judge

Dated: October 1, 1996

Appendix F

DOCKET NO. 997
BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE BRAND-NAME PRESCRIPTION DRUGS
ANTITRUST LITIGATION

Robert A. Huggins, et al., v. Abbott Laboratories, et al.,
S.D. Alabama, C.A. No. 1:96-193

BEFORE JOHN F. NANGLE, CHAIRMAN, ROBERT R. MERHIGE, JR., WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER,* JOHN F. GRADY, BAREFOOT* AND LOUIS C. BECHTLE, JUDGES OF THE PANEL

TRANSFER ORDER

Presently before the Panel is a motion, pursuant to Rule 12, R.P.J.P.M.L., 147 F.R.D. 589, 596 (1993), by plaintiffs in the above-captioned action (*Huggins*) to vacate the Panel's order conditionally transferring *Huggins* to the Northern District of Illinois for inclusion in the centralized pretrial proceedings occurring there in this docket before Judge Charles P. Kocoras. All defendants favor inclusion of *Huggins* in Section 1407 proceedings.

On the basis of the papers filed and the hearing held, the Panel finds that *Huggins* involves common questions of fact with the actions in this litigation previously centralized in the Northern District of Illinois, and that transfer of *Huggins* to that district for inclusion in the coordinated or consolidated pretrial proceedings occurring in that district will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. We note that the pending motion to remand *Huggins* to state court can be presented to and decided by the transferee judge. *See, e.g., In re Ivy*,

* Judges Brimmer and Sanders took no part in the decision of this matter.

901 F.2d 7 (2d Cir. 1990); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 368 F.Supp. 812, 813 (J.P.M.L 1973).

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, *Robert A. Huggins, et al., v. Abbott Laboratories, et al.*, S.D. Alabama, C.A. No. 1:96-193 be, and the same hereby is, transferred to the Northern District of Illinois, and, with the consent of that court, assigned to the Honorable Charles P. Kocoras for inclusion in the coordinated or consolidated pretrial proceedings occurring there.

FOR THE PANEL:

/s/ JOHN P. NANGLE
John P. Nangle
Chairman

Appendix G

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
96-0193-CB-M

ROBERT A. HUGGINS, on behalf of himself and all others similarly situated,

Plaintiff,

—v.—

ABBOTT LABORATORIES, et. al.,

Defendants.

ORDER

There are several motions currently pending in this action. Plaintiffs have filed a motion to remand this action to state court (doc. # 29), a motion for expedited consideration of the motion to remand (doc. # 31) and a motion requesting the Court to enjoin defendants from taking any action to have this action transferred to another district by the Judicial Panel on Multidistrict Litigation ("MDL Panel") (doc. # 33). Defendants have filed responses to the motion to enjoin (doc. # 36) and the motion for expedited consideration of the motion to remand (doc. # 37). In addition, defendants have filed a motion to stay proceedings in this action pending final action by the MDL Panel (doc. # 38). After carefully considering these motions, the Court enters the following orders.

First, plaintiffs' motion for expedited consideration is DENIED. In essence, plaintiffs are asking the Court to put the remainder of its docket on hold so that plaintiffs can have their motion decided before the MDL Panel rules on transfer. Moreover, if this case should be transferred, the transferee court is probably in a better position to determine whether the case should be remanded, given that court's experience with these types of actions.

Next, plaintiffs' motion to enjoin defendants from notifying the MDL Panel about the existence of this litigation is MOOT. According to defendants, they had already notified the Panel on March 6, 1996. Moreover, this Court has received a copy of the conditional transfer order in this case filed March 13, 1996, by the Clerk of the MDL Panel.

Defendants' motion to stay proceedings, including consideration of the motion to remand, is hereby GRANTED. While the Court recognizes that it has jurisdiction to rule on pending motions at any time before the conditional transfer becomes final, *Fed. R. Multi.* P.13(e), based on the Court's prior experience with Multidistrict litigation it would be an unwise expenditure of judicial resources to do so. Accordingly, all proceedings herein are STAYED pending a ruling by the MDL Panel on defendants' request to transfer this action to the United States District Court for the Northern District of Illinois for consolidation with *In re Brand-Name Prescription Drug Litigation* MDL No. 997.

It is so ORDERED.

DONE this the 22nd day of March, 1996.

/s/ CHARLES R. BUTLER JR.
CHIEF DISTRICT JUDGE

Appendix H

IN THE CIRCUIT COURT OF CLARKE COUNTY, ALABAMA

Civil Action No. CV-96-24C
Filed January 30, 1996

ROBERT A. HUGGINS, on behalf of himself and all others similarly situated.

Plaintiff,

—v.—

ABBOTT LABORATORIES, et. al.,

Defendants.

ORDER

The Court now has before it the motion of Plaintiff, Robert A. Huggins, for certification of a class pursuant to Rule 23 of the Alabama Rules of Civil Procedure. Pursuant to the provisions of Rule 23, A.R.C.P., and the other terms of this order, conditional class certification is now granted, on the terms and conditions set forth below:

The class shall consist of:

- **All persons who within the relevant time period purchased: (a) Brand-Name Prescription Drugs manufactured by the Defendants, (b) from Independent Retail Pharmacies, (c) in the State of Alabama and in other "indirect purchaser" jurisdictions, including**

but not limited to the District of Columbia, Kansas Maine, Michigan, Minnesota, Mississippi, New Mexico, and Wisconsin (the "Class jurisdictions"), and (d) who have not been completely reimbursed.

Excluded from this conditional class are (1) all claims for personal injury, (2) all compensatory claims by any person or entity that has already commenced or does commence prior to final judgment of this present action, an individual civil action related to the subject matter of this litigation, (3) all compensatory claims for $50,000.00 or more and (4) the defendants.

The Court finds that the requirements for certifying a class under Rule 23 are met. The requirement as to numerosity is met. Plaintiff alleges that the exact size of the class is unknown; however, due to the nature of trade and commerce involved, joinder of these claims is impracticable. The same issues of fact and law arise as to Defendants' conduct in restraint of trade, deceptive trade practices and price fixing so that commonality of the issues exists. Plaintiff's claim, like those of all other class members, arises from defendants' alleged conduct in restraint of trade, deceptive trade practices and price fixing so that the typicality requirement is satisfied. Finally, the Court is satisfied that Plaintiff, who has retained counsel with extensive experience prosecuting class actions, including consumer and anti-trust class actions, will be a fair and adequate representative of the class.

The questions of law and fact which are common to the members of the class in this case predominate over any questions that affect only individual members. Furthermore, a class action suit is the fairest and most efficient means of adjudicating this case. Accordingly, the Class satisfies all requirements for conditional certification under Rule 23.

DONE THIS THE 30TH DAY OF JANUARY, 1996.
11:15 a.m.

/s/ HAROLD L. CROW
CIRCUIT COURT JUDGE

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 94 C 897, MDL 997

Charles P. Kocoras, *Judge*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 96-2458, 96-2485
96-2814, 97-2156

IN RE: BRAND NAME PRESCRIPTION DRUGS
ANTITRUST LITIGATION

October 8, 1997

Before
Hon. RICHARD A. POSNER, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

ORDER

Petitions for rehearing with suggestions for rehearing *en banc* have been filed by Amerisource Corporation, DuPont Merck Pharmaceutical Company, Ciba-Geigy Corporation, and American Home Products Corporation. All the judges on the original panel have voted to deny the petitions, and none of the active judges has requested a vote on the suggestions for rehearing *en banc*. The petitions for rehearing are therefore DENIED.

Hon. Walter J. Cummings, Hon. Kenneth F. Ripple, and Hon. Daniel A. Manion did not participate in the consideration of the petitions.

Appendix J

MICHIE'S ALABAMA CODE
TITLE VI. CIVIL PRACTICE
CHAPTER 5. ACTIONS
ARTICLE 5. TRUSTS, COMBINES, OR MONOPOLIES

§ 6-5-60 Generally.

(a) Any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500 and all actual damages from any person, firm, or corporation creating, operating, aiding, or abetting such trust, combine, or monopoly and may commence the action therefor against any one or more of the parties to the trust, combine or monopoly, or their attorneys, officers, or agents, who aid or abet such trust, combine, or monopoly. All such actions may be prosecuted to final judgment against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, or judgment in favor of one or more of the defendants.

(b) Actions under this section may be commenced in any county where the trust, combine, or monopoly was formed or where it exists or is carried on, promoted, operated, practiced, employed, used, or enjoyed, or in any county in which either of the defendants may have a domicile or where an officer or agent of any defendant corporation may be found.

Appendix K

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER I. MONOPOLIES AND COMBINATIONS
IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND
JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 85. DISTRICT COURTS; JURISDICTION

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of

Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11706 or 14706 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND
JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 89. DISTRICT COURTS;
REMOVAL OF CASES FROM STATE COURTS

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND
JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 155. INJUNCTIONS:
THREE-JUDGE COURTS

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Appendix L

IN THE CIRCUIT COURT OF CLARKE COUNTY, ALABAMA

CIVIL ACTION NO.:
CV-96-24C
CLASS ACTION COMPLAINT

ROBERT A. HUGGINS, on behalf of himself and all others similarly situated,

Plaintiff,

—v.—

ABBOTT LABORATORIES, an Illinois corporation; AMERICAN CYANAMID COMPANY, a Maine corporation; AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation; BRISTOL-MEYERS SQUIBB COMPANY, a Delaware corporation; BURROUGHS-WELLCOME CO., a North Carolina corporation; CARTER-WALLACE, INC., a Delaware corporation; CIBA-GEIGY CORPORATION, a New York corporation; THE DUPONT MERCK PHARMACEUTICAL COMPANY, a Pennsylvania corporation; ELI LILLY AND COMPANY, an Indiana corporation; FOREST LABORATORIES, INC., a Delaware and Wisconsin corporation; G.D. SEARLE & CO., INC., a New Jersey corporation; GLAXO, INC., a North Carolina corporation; MARION MERRELL DOW, INC., a Delaware corporation; MERCK & CO., a New Jersey corporation; ORTHO PHARMACEUTICALS CORPORATION, a Delaware corporation; PFIZER, INC., a Delaware corporation; RHONE-POULENC RORER PHARMACEUTICAL, INC., a New York corporation; SANDOZ PHARMACEUTICALS CORPORATION, a Delaware corporation; SCHERING-PLOUGH CORPORATION, a New Jersey corporation; SMITHKLINE BEECHAM PHARMACEUTICALS

CO., a Delaware corporation; THE UPJOHN COMPANY, a Delaware corporation; WARNER-LAMBERT COMPANY, a Delaware corporation; and, ZENECA, INC., a Delaware corporation; individually and jointly,

Defendants.

COMPLAINT

COMES NOW the Plaintiff, ROBERT A. HUGGINS, on behalf of himself and all others similarly situated, and alleges and states the following:

Nature of the Case

1. This lawsuit is brought as a class action pursuant to Rule 23 of the Alabama Rules of Civil Procedure. This action seeks (1) an injunction prohibiting the Defendants from creating, operating, aiding, abetting or participating in any trust, combine or monopoly, the effect of which is to damage Plaintiff and members of the class through price-fixing or otherwise; and (2) a recovery for a class of entities in the states of Alabama, District of Columbia, Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico and Wisconsin (Collectively, the "Class Jurisdictions"), which have indirect purchaser statutory relief which is "substantially similar" to § 6-5-60 of the *Code of Alabama* (1975), which provides that any person, firm or corporation injured or damaged by any unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500.00 and all actual damages. The Defendants are manufacturers of pharmaceuticals and prescription medications who have conspired and combined to fix the price of Brand-Name Prescription Drugs. Plaintiff brings this action on behalf of himself and the class of persons or entities who have been injured by the Defendants' conspiracy to unlawfully fix prices.

2. This price-fixing case stems from Defendants' conduct of conspiring to restrain trade in the market for, and fix the price of, Brand-Name Prescription Drugs. Defendants are manufacturers of Brand-Name Prescription Drugs who, through their combined and conspiratorial conduct, illegally fixed, maintained and stabilized the prices of Brand-Name Prescription Drugs at supra-competitive prices. Because of Defendants' conduct, Brand-Name Prescription Drugs were sold to Independent Retail Pharmacies at supra-competitive prices. These excessive prices were then passed-on directly to Plaintiff and class members, who purchased Brand-Name Prescription Drugs from Independent Retail Pharmacies.

3. Plaintiff and the class members do not have a remedy for their injures under the federal antitrust laws, because they did not purchase the Brand-Name Prescription Drugs directly from the Defendants. See *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977). The Alabama Antitrust Statute and analogous antitrust statues in the Class Jurisdictions, however, specifically authorize recovery by persons who were indirectly injured by a conspiracy to unlawfully fix prices. The United States Supreme Court, in the case of *California v. ARC Corp.*, 109 S. Ct. 1661 (1989), has ruled that such state antitrust statutes are not preempted by federal law, and that these statutes permit the recovery of damages by indirect purchasers who are not permitted to recover damages under federal law.

4. This action also seeks an injunction and a recovery for a class of individuals from those states (the Class Jurisdictions) which permit recovery, except California, who have been defrauded by the Defendants through their conspiracy to fix the price of Brand-Name Prescription Drugs. Plaintiff brings this action on behalf of himself and the statewide class of persons who have been injured by Defendants' fraud in fixing prices.

Jurisdiction and Venue

5. The court has jurisdiction over the parties and subject matter of this action pursuant to *Code of Alabama* (1975) § 6-3-7, because each defendant is and was transacting business at all times material herein in Clarke County, State of Alabama. Venue is properly laid in Clarke County, State of Alabama, pursuant to the *Code of Alabama* (1975) §§ 6-3-7 and 6-5-60(b)

6. Defendants' unlawful conduct, directly or through their subsidiaries, affiliates or agents pursuant to the combination and conspiracy alleged herein has had a direct adverse effect on consumers within the State of Alabama and the Class Jurisdictions, and the trade and commerce described below is carried on, in part, within the State of Alabama, and Clarke County.

7. As a result of the manufacture, distribution, delivery and sales of Brand-Name Prescription Drugs to purchasers within the Clarke County and throughout the State of Alabama, defendants, directly or through their subsidiaries, affiliates or agents, obtained the benefits of the laws of the State of Alabama and the Alabama market for Brand-Name Prescription drugs.

8. No aspect of the claims asserted in this Complaint are brought pursuant to the federal antitrust laws. Although the exact amount of damages caused to the class members cannot be precisely determined without access to Defendants' records, neither Plaintiff nor the individual class member shave damages, exclusive of interest and costs, equal to or greater than $50,000.00.

Definitions

9. "Brand-Name Prescription Drugs" means non-generic drugs manufactured by Defendants and available to Plaintiffs only when prescribed by a physician.

10. "Third-Party Plans" means benefit plans, insurance policies and HMOs that cover the cost of Brand-Name Prescription Drugs on behalf of consumers.

11. "Co-Payment" means that portion of the cost of a prescription for Brand-Name Prescription Drugs which consumers are required to pay.

12. "HMO" means Health Maintenance Organizations.

13. "Mail Order Pharmacies" are businesses that receive prescriptions through the mail from customers and fill those prescriptions by dispensing the drug to customers through the mail. Independent retail pharmacies compete with Mail Order Pharmacies for the sale of Brand-Name Prescription Drugs to Plaintiff and class members.

14. "Independent Retail Pharmacies" are businesses that sell Brand-Name Prescription drugs directly to Plaintiff and class members when presented with a prescription.

15. "Indirect Purchaser" is a consumer who purchased Brand-Name Prescription Drugs from an Independent Retail Pharmacy and not directly from Defendants.

16. "Class Jurisdictions" means those states that have state antitrust statues which allow recovery by indirect purchasers. The Class Jurisdictions include, but are not limited to Alabama, District of Columbia, Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico and Wisconsin.

17. "Relevant Time Period" or "Class Period" means January 1, 1991 to the present.

The Parties

18. The Plaintiff, Robert A. Huggins, is a resident of Clarke County, Alabama. Plaintiff, Robert A. Huggins indirectly purchased Brand-Name Prescription Drugs during the relevant time period.

19. During the time period covered by this Complaint, Plaintiff purchased Defendants' Brand-Name Prescription Drugs from Independent Retail Pharmacies. Plaintiff brings this action as an aggrieved party both individually in his own capacity and as a representative of all person similarly situated (the "Class").

20. At all material times, Plaintiff purchased Brand-Name Prescription Drugs indirectly from Defendants. Plaintiff purchased Brand-Name Prescription Drugs for his consumption and that of his family's and not for resale.

21. Defendant Abbott Laboratories ("Abbott") is a corporation organized and existing under the laws of the State of Illinois. Abbott is the manufacturer of numerous Brand-Name Prescription drugs, including but not limited to the drugs Calcidrine, Colchicine, Cylert, Depakene, Depakote, E.E.S., Eryped, Endoron, Enduronyl, Ery-Tab, Erthrocin, Erythromycin Delayed-Release, Fero-Folic 500, Hytrin, Iberat-Folic 500, K-Tab, Nembutal, Ogen, PCE, Placidyl, ProSom and Tranxene. Abbott sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

22. Defendant American Cyanamid Company ("American Cyanamid") is a corporation organized and existing under the laws of the State of Maine. American Cyanamid is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Diamox, Methotrexate, Myambutol, Matema, Minocin, Netpazane, Nilstat, Suprax and Vereland. American Cyanamid sells these and other drugs in Alabama and throughout the United States including this judicial Circuit.

23. Defendant American Home Products Corporation ("American Home") is a corporation organized and existing under the laws of the State of Delaware. American Home is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Advil Suspension, Ativan Tablets, Aygestin, Cordarone Tablets, Grisactin,

Inderal Tablets, Isordil Tablets, Lo/Ovral, Lodine, Mico-K, Mysollne, Norplant System, Orudis, Ovral, Premarin, Quinidex, Sectral, Surmontil, Tanex, Triphasil, Wygesic, and Wytensin. American Home sells these and other drugs in Alabama and throughout the United States including this judicial Circuit.

24. Defendant Bristol-Myers Squibb Company ("Bristol") is a corporation organized and existing under the laws of the State of Delaware. Bristol is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Corgard, Corzide, K-Lyte, Klotrix, Questran, Cytoxan, Megace, Mycostatin, Capoten and Capozide. Bristol sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

25. Defendant Burroughs-Wellcome Co. ("Burroughs-Wellcome") is a corporation organized and existing under the laws of the State of North Carolina. Burrroughs-Wellcome is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Actified with Codeine, Alkeran, Cortisporin, Empirin with Codeine, Imuran, Lanoxin, Lanoxicaps, Leukeran, Myleran, Neosporin, Pediotic, Proloprim, Septra, Viroptic, Wellbutrin, Zovirax and Zyloprim. Burroughs-Wellcome sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

26. Defendant Carter-Wallace, Inc. ("Carter-Wallace") is a corporation organized and existing under the laws of the State of Delaware. Carter-Wallace is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Organidin, Rynatuss, Soma Compound, Tussi-Organidin and VoSol. Carter-Wallace sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

27. Defendant Ciba-Geigy Corporation ("Ciba-Geigy") is a corporation organized and existing under the laws of the State of New York. Ciba-Geigy is the manufacturer of numer-

ous Brand-Name Prescription Drugs, including not limited to the drugs Anturane, Brethaira, Brathine, Estraderm Patch, Liorasal, Lotensin, Ludiomil, Rinactane, Ritalin, Ser-Ap-Es, Slow-K, Tegratol, Ten-k, Tofranil, Transderm-Nitro, Transderm-Scop and Zstraderm. Ciba-Geigy sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

28. Defendant The DuPont Merck Pharmaceutical Company ("DuPont Merck") is a corporation organized and existing under the laws of the State of Pennsylvania. DuPont Merck is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Hycodan, Hycomine, Hycotuss, Moban, Symmetrel, Zydone, Coumadin, Percodet, Percodan and Sinmet. DuPont Merck sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

29. Defendant Eli Lilly and Company ("Eli Lilly") is a corporation organized and existing under the laws of the State of Indiana. Eli Lilly is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Axid, Ceclor, Darvon, Darvocet-N, Colchicine, Dolophine, Ergotrate, Humulin Insulin, Iletin Insulin and Phenobarbital. Eli Lilly sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

30. Defendant Forest Laboratories, Inc. ("Forest") is a corporation organized and existing under the laws of the State of Wisconsin. Forest is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Aerobid, Elixophyllin, Esgic, Levothroid, Tessalon and Thyrolar. Forest sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

31. Defendant G.D. Searle & Co. ("Searle") is a corporation organized and existing under the laws of the State of Delaware. Searle is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the

drugs Aladactzaide, Aldactone, Calan, Calan SR, Cytotec, Demulen, Flagyl, Karlone, Lomotil, Maxaquin, Nitrodisc, Norpace and Norpace CR. Searle sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

32. Defendant Glaxo Inc. ("Glaxo") is a corporation organized and existing under the laws of the State of North Carolina. Glaxo is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Alcovate Cream, Baclevant, Beconase, Baconase AQ, Cutivate Cream, Oxistate Cream, Trandate, Temovate Cream, Vantolin and Zantac Tablets. Glaxo sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

33. Defendant Marion Merrell Dow, Inc. ("Marion") is a corporation organized and existing under the laws of the State of Delaware. Marion is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs AVC, Bricanyl, Bentyl, Carafate, Cardizem, Chronulac, Clomid, Lorelco, Nicorette, Norpramin, Novafed A, Novahistine Expectorant, Rifadin, Seldane, Silvadene and Tenuate. Marion sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

34. Defendant Merck & Co., Inc. ("Merck") is a corporation organized and existing under the laws of the State of New Jersey. Merck is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Aldoclor, Aldomet, Aldoril, Benemid, Blocadren, Clinoril, Cogentin, Colbenemid, Cortone, Cuprimine, Decadron, Diuril, Dolobid, Flexeril, Hydrodiuril, Hydropres, Indocin, Mephyton, Mevacor, Moduretic, Noroxin, Pepcid, Periactin, Plendil, Prilosec, Prinivil, Prinzide, Timolide, Tonocard, Triavil, Urecholine, Vaseretic, Vasotec and Vivactil. Merck sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

35. Defendant Ortho Pharmaceutical Corporation ("Ortho") is a corporation organized and existing under the laws of the State of Delaware. Ortho is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Floxin, Grifulvin, Ortho-Novum, Spectazole and Terazol. Ortho sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

36. Defendant Pfizer, Inc. ("Pfizer") is a corporation organized and existing under the laws of the State of Delaware. Pfizer is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Diabinese, Feldene, Gleustrol, Minipress, Norvasc Tablets, Procardia, Vibra-Tabs, Vibramycin, Vistaril and Zithromax. Pfizer sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

37. Defendant Rhone-Poulenc Rorer Pharmaceuticals, Inc., ("Rhone") is a corporation organized and existing under the laws of the State of New York. Rhone is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Azmacort, DDAVP, Lozol, Nasacort and Slo-Bid. Rhone sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

38. Defendant Sandoz Pharmaceuticals Corporation ("Sandoz") is a corporation organized and operating under the laws of the State of Delaware. Sandoz is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Bellergal-S, Cafergot, Dynacirc, Fioricet, Fiorinal, Hydergine, Mellaril, Metaprel, Methergine, Pamelor, Parlodel, Restoril, Sandimmune, and Visken. Sandoz sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

39. Defendant Schering-Plough Corporation ("Schering") is a corporation organized and existing under the laws of the State of New Jersey. Schering is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Celestone, Diprolene, Diprosone, Elocon,

Estinyl, Estrafon, Eulexin Capsules, Fulvicin, Garamycin, Intron A, K-dur, Lotrimin, Nermodyne, Optimine, Oreton, Permitil, Polaramine, Proventil, Theo-Dur, Trilafon, Valisone, Vancenase, Vancenase AQ Nasal Spray, and Vancaril. Schering sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

40. Defendant SmithKline Pharmaceuticals Co, ("SmithKline") is a corporation organized and existing under the laws of the State of Delaware. Schering is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Amoxil, Augmentin, Bactroban, Compazine, Dyazide Capsules, Energix-B, Eskalith, Relafan, Ridaura, Stelazine, Tagamet and Tigan. SmithKline sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

41. Defendant Upjohn Company ("Upjohn") is a corporation organized and existing under the laws of the State of Delaware. Upjohn is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Ansaid, Cleocin, Didrex, Halcion, Halotestin, Loniten, Micronase, Motrin, Rogaine and Xanax. Upjohn sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

42. Defendant Warner-Lambert Company ("Warner-Lambert") is a corporation organized and existing under the laws of the State of Delaware. Warner-Lambert is the manufacturer of numerous Brand-Name Prescription Drugs, including but not limited to the drugs Anusol, Benadryl, Chloromycetin, Choledyl, Coly-Mycin, Dilantin, Doryx, Ergostat, ERYC, Estrovis, Euthroid, Loestrin, Lopid, Meclomen, Nardil, Nitrostat, Norelestrin, Pyridium, Vira-A and Zarontin. Warner-Lambert sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

43. Defendant Zeneca, Inc ("Zeneca") is a corporation organized and existing under the laws of the State of Delaware. Warner-Lambert is the manufacturer of numerous

Brand-Name Prescription Drugs, including but not limited to the drugs Nolvadex, Sorbitrate, Tenoretic and Tenormin. Zeneca sells these and other drugs in Alabama and throughout the United States, including this judicial Circuit.

44. The Defendants identified in Paragraphs 21 through 43 above are hereinafter sometimes referred to collectively as the "Manufacturer Defendants."

45. During the relevant time period, Defendants and their co-conspirators sold and shipped substantial quantities of Brand-Name Prescription Drugs in a continuous and uninterrupted flow of commerce to customers in Alabama.

46. Whenever in this Complaint reference is made to any act, deed or transaction of any corporation or organization, the allegations include any predecessors, successors, parents, subsidiaries, affiliates and divisions of that corporation or organization engaged in the act or deed or transaction by or through its officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

Class Action Allegations

47. Plaintiff brings this action on behalf of himself and all others similarly situated, pursuant to Rule 23 of the Alabama Rules of Civil Procedure. The class is defined and described as follows:

> All persons who within the relevant time period purchased: (a) Brand-Name Prescription Drugs manufactured by Defendants, (b) from Independent Retail Pharmacies, (c) in the State of Alabama and in other "indirect purchaser" jurisdictions, including but not limited to the District of Columbia, Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico, and Wisconsin (the "Class jurisdictions"), and (d) who have not been completely reimbursed.

48. State of California residents are specifically excluded from the Class because their rights are already being protected in a California state class action, where a class of California indirect purchasers has already been certified.

49. This action seeks recovery only for economic injuries suffered by all members of the class and is expressly not intended to request any recovery for personal injury.

50. Plaintiff does not know the exact size of the class. However, due to the nature of the trade and commerce involved, the members of the class are so numerous as to render joinder of all class members in this action impracticable

51. There are questions of law and fact common to the class, including, but not limited to the following:

a. whether Defendants combined, conspired and otherwise engaged in a common course of conduct to discriminate in the sale of Brand-Name Prescription Drugs to independent retail pharmacies, from whom Plaintiffs and class members purchased Brand-Name Prescription Drugs;

b. whether Defendants combined, conspired and otherwise engaged in a common course of conduct to fix, raise, maintain or stabilize prices of Brand-Name Prescription Drugs;

c. whether the combination, conspiracy and common course of conduct was implemented;

d. whether Defendants discriminated against independent retail pharmacies in pricing Brand-Name Prescription Drugs;

e. whether the combination, conspiracy and common course of conduct is continuing, thus entitling the class to injunctive relief;

f. whether Defendants took steps to actively conceal the trust, combination, contract arrangement or agreement from Plaintiff and other class members;

g. whether Defendants' conduct caused retail prices of Brand-Name Prescription Drugs sold in the State of Alabama to be fixed, raised, maintained or stabilized at artificially high and noncompetitive levels;

h. whether Plaintiff and other class members were injured by Defendants' conduct and, if so, the appropriate class-wide measure of damages; and,

i. the operative time period of the combination, conspiracy and common course of conduct.

52. These and other questions of law and fact are common to the class and predominate over any question affecting only individual members of the class.

53. Plaintiff's claims are typical of the claims of those of the proposed class because both purchased Brand-Name Prescription Drugs from Independent Retail Pharmacies, who in turn purchased Brand-Name Prescription Drugs from Defendants. Plaintiff's claims arise from the identical course of conduct giving rise to the claims of the class, and relief sought common to the class.

54. Plaintiff will fairly and adequately protect the interests of the class in that Plaintiff is a typical indirect purchasers of Brand-Name Prescription Drugs and have no conflict with any other class members. Plaintiff has no interests which are adverse to the interests of the class members. Plaintiff has retained counsel experienced in class action and antitrust litigation to represent him and the class.

55. This class action is superior to the alternatives, if any, for the fair and efficient adjudication of this controversy because joinder of all damaged indirect purchasers is impractical. Although the damages suffered by each individual class member may total hundreds of dollars, damages of such magnitude are nonetheless relatively small given the expense and burden of individual prosecution of complex and extensive litigation necessitated by Defendants' combination and con-

spiracy. It would be virtually impossible for class members to redress effectively and individually the wrongs done to them.

56. Even if the class members themselves could afford such individual litigation, the court system could not. Individualized litigation presents the potential for inconsistent or contradictory judgments, and it magnifies the delay and expense to all parties and to the court system presented by the complex legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties and provides the benefits of unitary adjudication, economies of scale and comprehensive supervision by a single court.

57. In the absence of this class action, Defendants will retain the benefits of their wrongful conduct.

Fraudulent Concealment

58. Throughout the time period set forth herein, Defendants fraudulently concealed their unlawful trust, combination and conspiracy from Plaintiff and class members.

59. In order to fraudulently conceal their trust, combination and conspiracy from Plaintiff and class members, Defendants engaged in the following affirmative conduct:

a. Defendants, throughout the period of their unlawful conduct. secretly and conspiratorially fixed and raised the prices of Brand-Name Prescription Drugs;

b. Defendants refrained from competing, on the basis of price, for the business of customers;

c. Defendants, throughout the period of their unlawful conduct, secretly and conspiratorially discussed and agreed among themselves to fix and raise the prices of Brand-Name Prescription Drugs; and,

d. Defendants, throughout the period of their unlawful conduct, used means of communication that they believed to be

safe from detection and avoided means of communication that they believed to be subject to detection.

60. At all material times, the market for Brand-Name Prescription Drugs was dominated and controlled by Defendants. Defendants maintained close and tightly-knit relationships between and among themselves for the purpose, among others, of planning and implementing the activities and conduct alleged herein. Consequently, much of Defendants' communication underlying the wrongful conduct alleged herein was carried out during telephone conversations, during informal and otherwise secret meetings and gatherings, and by other informal methods of communication not discoverable by outside parties. Therefore, the substance of these communications was not known to, and not reasonably discoverable by, Plaintiff or class members.

61. Because of the secret and conspiratorial nature of their conduct, including Defendants' use of collusive, non-competitive and fixed-price quotations, Plaintiff and class members, in the exercise of reasonable diligence, did not know, and could not have known, of Defendants' unlawful conduct until recently.

62. The running of any statute of limitations has therefore been suspended with respect to the claims alleged herein by virtue of fraudulent concealment.

COUNT I

Alabama Commercial Law and Consumer Protection Act § 6-5-60, *et seq.*.

63. Plaintiff realleges each of the paragraphs above as if fully set forth herein.

64. Insurance companies and certain types of HMOs offer Third-Party Plans. Thousands of people in Alabama have some or all of the cost of their prescription drugs covered by Third-Party Plans.

65. The sponsors of Third-Party Plans, alone or in conjunction with administrators that they hire to administer the plans, select the pharmacy or pharmacies that will provide Brand-Name Prescription Drugs to the participants in a plan.

66. Once the plan sponsor or plan administrator designates the pharmacy or pharmacies that will provide Brand-Name Prescription Drugs under the terms of a Third-Party Plan, the plan generally covers some or all of the cost of Brand-Name Prescription Drugs for a plan participant only if that participant has the prescription filled by the designated provider of the Brand-Name Prescription Drug. The designated provider fills the prescription and then receives payment from the plan sponsor or plan administrator in amount negotiated between the provider and the plan sponsor or administrator.

67. Independent Retail Pharmacies vigorously compete to provide Brand-Name Prescription Drugs to consumers whose purchases are covered under Third-Party Plans by seeking designation as a Brand-Name Prescription Drug provider to Third-Party Plans.

68. Independent Retail Pharmacies' competitors for these sales include, but are not limited to, Mail Order Pharmacies.

69. Independent Retail Pharmacies have purchased Brand-Name Prescription Drugs (including but not limited to those identified in Paragraphs 21 through 43 above), in Alabama and the Class jurisdictions, manufactured by each of the Manufacturer Defendants. Independent retail pharmacies purchased these drugs from the Manufacturer Defendants.

70. Based upon information and belief, Plaintiff alleges that as part of a common course of conduct, each of the Manufacturer Defendants have sold Brand-Name Prescription Drugs to Mail Order Pharmacies, in Alabama and the Class jurisdictions, at substantial discounts or with substantial rebates from the prices contemporaneously charged by the Manufacturer Defendants for the same drugs to independent retail pharmacies.

71. As a direct result of the favorable, discriminatory prices charged to Mail Order Pharmacies by the Manufacturer Defendants and not offered to independent retail pharmacies, Plaintiff has paid supra-competitive prices for Brand-Name Prescription Drugs.

72. Defendants combined capital and skill and/or engaged in concerted activity forming a trust for the purpose of effectuating the following;

(a) creating or carrying out restrictions in commerce;

(b) increasing the price of Brand-Name Prescription Drugs;

(c) preventing competition in the sale and distribution of Brand-Name Prescription Drugs at wholesale and retail; and

(d) making or entering into a contract, obligation or agreements to do the following:

(1) bind themselves not to sell Brand-Name Prescription Drugs at a price below a common standard figure or fixed value;

(2) keep the price of Brand-Name Prescription Drugs at a fixed figure or value; and,

(3) establish or settle the price of Brand-Name Prescription Drugs between themselves and others so as to preclude, directly or indirectly, free and unrestricted competition among themselves and any purchasers or consumers in the sale of Brand-Name Prescription Drugs.

73. During the period of time covered by this class action Complaint, Defendants manufactured and/or distributed Brand-Name Prescription Drugs for sale throughout Clarke County, State of Alabama, and the United States. Defendants accounted for the majority of all Brand-Name Prescription

Drugs sold and distributed in Clarke County, the State of Alabama, and the United States.

74. Defendants sell Brand-Name Prescription Drugs primarily to distributors who in turn resell those products to independent retail pharmacies. These independent retail pharmacies sell Brand-Name Prescription Drugs to Alabama consumers, such as Plaintiff and the class members.

75. Beginning before May of 1990, and continuing at least through the present, the exact dates being unknown to Plaintiff, Defendants engaged in a continuing trust, combination and conspiracy, in unreasonable restraint of trade to artificially raise, fix, maintain or stabilize prices for Brand-Name Prescription Drugs in Clarke County, State of Alabama, and Class jurisdictions.

76. In furtherance of the above-described conspiracy and trust, Defendants committed acts that they combined and contracted to do as part of an illegal price-fixing scheme, including, but not limited to, the following:

(a) discussed and decided among themselves the prices and other terms of sale for Brand-Name Prescription Drugs in Alabama and the Class jurisdictions;

(b) agreed to raise, regulate, stabilize and maintain the prices of Brand-Name Prescription Drugs in Alabama and the Class jurisdictions;

(c) agreed to charge certain prices for Brand-Name Prescription Drugs in Alabama and the Class jurisdictions; and

(d) received and accepted payments from customers for Brand-Name Prescription Drugs sold at agreed upon prices in Alabama and the Class jurisdictions.

77. In formulating and effectuating the trust, combination and conspiracy alleged herein, Defendants and co-conspirators did those things that they combined and contracted to do,

the substantive terms of which were to artificially raise, fix, maintain or stabilize prices for Brand-Name Prescription Drugs.

78. The trust, combination and conspiracy charged herein had the following effects, among others:

(a) prices charged by Defendants to the independent retail pharmacies have been maintained at artificially high and supra-competitive levels and passed on directly to Plaintiff and class members;

(b) prices for Brand-Name Prescription Drugs have risen frequently, substantially, and in a parallel manner by nearly identical amounts within days of each other;

(c) Independent Retail Pharmacies paid more for Brand-Name Prescription Drugs than they would have paid in a competitive marketplace, unfettered by collusive and unlawful price-fixing, and passed on the additional costs to Plaintiff and class members; and,

(d) competition has been restrained among sellers of Brand-Name Prescription Drugs in Alabama, the Class jurisdictions and throughout the United States.

79. Both distributors and retail outlets pass-on all of the supra-competitive fixed prices to consumers, such as Plaintiff and class members. None of the supra-competitive fixed prices paid by Plaintiff and class members are passed-on by them as they do not resell Brand-Name Prescription Drugs, but are consumed by themselves or their families.

80. As a direct and proximate result of Defendants' unlawful conduct alleged herein, Plaintiff and class members have paid more for Brand-Name Prescription Drugs than they would have paid in the absence of the illegal combination,

contract and agreement. and as a result, have been injured and suffered damages in an amount presently undetermined.

81. Defendants' conduct violates Ala. Code § 6-5-60.

Prayer For Relief

WHEREFORE, Plaintiff, on behalf of himself and on behalf of the class members defined herein, prays as follows:

A. That the Court determine that this action may be maintained as a class action and direct that reasonable notice of this action be given to each class member;

B. That the trust, combination, conspiracy, arrangement and agreement alleged herein be adjudged and decreed to be an unreasonable restraint of trade;

C. That Plaintiff and class members be awarded any damages allowed by law.

D. That Plaintiff and class members be awarded reasonable attorneys' fees and court costs;

E. That the Plaintiff and class members be awarded interest;

F. That Defendants be enjoined from continuing the unlawful trust, combination, contract, arrangement and agreement alleged herein; and,

G. That Plaintiff and class members be granted further relief as the Court may deem just and proper.

Jury Demand

Plaintiff demands trial by jury of all issues so triable in this cause.

Respectfully submitted,

JACKSON, TAYLOR & MARTINO, P.C.

By: STEVEN A. MARTINO
STEVEN A. MARTINO
Post Office Box 894
Mobile, Alabama 36601
PH: (334) 433-3131

GILMORE & GILMORE,

By: WYMAN O. GILMORE, JR.
WYMAN O. GILMORE, JR.
Post Office Box 729
Grove Hill, Alabama 36451
PH: (334) 275-3115

OF COUNSEL:

Mr. Steven Berman, Esq.
HAGENS & BERMAN
1301 Fifth Avenue
Suite 2929
Seattle, Washington 98101

Mr. Michael D. Hausfeld, Esquire
COHEN, MILSTEIN,
HAUSFELD & TOLL
West Tower, Suite 500
1100 New York Avenue, N.W.
Washington, D.C. 20005

Mr. Gordon K. Ball, Esquire
LAW OFFICES OF
GORDON BALL
Nations Bank Center
Suite 750
550 Main Avenue
Knoxville, Tennessee 37902

Mr. Samuel D. Heins, Esquire
HEINS, MILLER and OLSON
700 Northstar East
608 2nd Avenue, South
Minneapolis, Minnesota 55402

Mr. John W. "Don" Barrett
BARRETT LAW OFFICES
Post Office Box 631
Lexington, Mississippi 39095

Hon. Ann D. White
MAGER, LIEBENBERG & WHITE
Suite 415, Two Penn Center Plaza
Philadelphia, Pennsylvania 19102

ATTORNEYS FOR PLAINTIFF

DEFENDANTS MAY BE SERVED VIA
CERTIFIED MAIL AS FOLLOWS:

ABBOTT LABORATORIES
c/o Charles M. Brock
1 Abbott Park Road
Abbott Park, Illinois 60064-3500

AMERICAN CYANAMID COMPANY
c/o CT Corporation System
818 West Seventh Street
Los Angeles, California 90017

AMERICAN HOME PRODUCTS CORPORATION
c/o The Prentice-Hall Corporation System, Inc.
32 Loockerman Square
Suite L-100
Dover, Delaware 19901

BRISTOL-MEYERS SQUIBB COMPANY
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19800

BURROUGHS-WELLCOME CO.
c/o Paul Holcombe, Jr.
3030 Cornwallis Road
Research Triangle Park, North Carolina 27709

CARTER-WALLACE, INC.
c/o CT Corporation System
818 West Seventh Street
Los Angeles, California 90017

CIBA-GEIGY CORPORATION
c/o The Prentice-Hall Corporation System, Inc.
32 Loockerman Square
Suite L-100
Dover, Delaware 19901

THE DUPONT MERCK PHARMACEUTICAL COMPANY
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19800

ELI LILLY AND COMPANY
c/o CT Corporation System
818 West Seventh Street
Los Angeles, California 90017

FOREST LABORATORIES, INC.
838 Sterling Place
Brooklyn, New York 11216

G.D. SEARLE & CO., INC.,
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19801

GLAXO, INC.
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19800

MARION MERRELL DOW, INC.
c/o CT Corporation System
818 West Seventh Street
Los Angeles, California 90017

MERCK & CO.
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19801

ORTHO PHARMACEUTICAL CORPORATION
c/o CT Corporation System
818 West Seventh Street
Los Angeles, California 90017

PFIZER, INC.
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19800

RHONE-POULENC RORER PHARMACEUTICALS, INC.
c/o CT Corporation System
1635 Market Street
Philadelphia, Pennsylvania 19103

SANDOZ PHARMACEUTICALS CORPORATION
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19800

SCHERING-PLOUGH CORPORATION
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19800

SMITHKLINE BEECHAM PHARMACEUTICALS CO.
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19800

THE UPJOHN COMPANY
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19801

WARNER-LAMBERT COMPANY
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19800

ZENECA, INC.
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, Delaware 19800

Appendix M

IN THE THIRD JUDICIAL CIRCUIT COURT
BARBOUR COUNTY, ALABAMA CLAYTON DIVISION

CIVIL ACTION NO: CV-94-041

WILLIAM MACK PRICE; JENNIFER JACKSON; and NEAL JACKSON, on Behalf of Themselves and all Other Similarly Situated Individuals,

Plaintiffs,

—v.—

AMERICAN HOME PRODUCTS CORPORATION, CIBA-GEIGY CORPORATION, G.D. SEARLE & CO., GLAXO, INC., PFIZER, INC., SCHERING-PLOUGH CORPORATION, SMITHKLINE BEECHAM PHARMACEUTICALS CO.,

Defendants.

JURY TRIAL DEMANDED

ORIGINAL CLASS ACTION COMPLAINT

I.
Background

1. This is a consumer class action involving the prescription drug industry brought pursuant to §§ 6-5-60 and §§ 8-10-1 *et seq*. of the Alabama Code. As alleged more fully below, this action arises from the unlawful trust, combine or monopoly comprised of the defendant prescription drug man-

ufacturers'. The discriminatory and unlawful pricing activities with regard to retail pharmacies and drug stores.

II.
THE PLAINTIFFS

2. Plaintiff William Price is a resident of Barbour County, Alabama.

3. Plaintiffs, Jennifer and Neal Jackson, are residents of Jefferson County, Alabama.

4. The plaintiffs have purchased brand-name prescription drugs at retail pharmacies for a number of years. Plaintiffs' primary prescription purchases during these years have been for a variety of products manufactured and sold by the Defendants. Plaintiffs bring this action on behalf of themselves and the thousands of similarly situated consumers in Alabama who purchase brand-name prescription drugs from local pharmacies and drug stores at illegally high prices dictated by the discriminatory pricing scheme set by the Defendants.

II.
Defendant Manufacturers

5. Defendant American Home Products Corporation ("American Home") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York. American Home is the manufacturer of numerous brand-name prescription drugs, including but not limited to the drugs Aygestin, Inderal, Isordil, Lodine, Micro-K, Mysoline, Orudis, Premarin, Quinidex Ext, Sectral, Tenex, and Wytensin. American Home sells these and other drugs throughout this State and county.

6. Defendant Ciba-Geigy Corporation ("Ciba-Geigy") is a corporation organized and existing under the laws of the State of New York, with its principal place of business in Ardsley, New York. Ciba-Geigy is the manufacturer of numerous

brand-name prescription drugs, including but not limited to the drugs Brethaire, Brethine, Estraderm, Liorasal, Lotensin, Rimactane, Slow-K, Tegretol, Ten-k, Trasderm-Nitro, and Tofranil. Ciba-Geigy sells these and other drugs this State and County.

7. Defendant G. D. Searle & Co. ("Searle") is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in Skokie, Illinois. Searle is the manufacturer of numerous brand-name prescription drugs, including but not limited to the drugs Aldactazide, Aldactone, Calan, Calan Sr, Cytotec, Kerlone, and Nitrodisc. Searle sells these and other drugs throughout this State and County.

8. Defendant Glaxo, Inc. ("Glaxo") is a corporation organized and existing under the laws of the State of North Carolina, with its principal place of business in Research Triangle Park, North Carolina. Glaxo is the manufacturer of numerous brand-name prescription drugs, including but not limited to the drugs Beclovant, Beconase, Beconase AQ, Trandate, Ventolin, and Zantac. Glaxo sells these and other drugs throughout this State and County.

9. Defendant Pfizer, Inc. ("Pfizer") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York. Pfizer is the manufacturer of numerous brand-name prescription drugs, including but not limited to the drugs Diabinese, Glucotrol, Procardia, Vibramycin, and Vistaril. Pfizer sells these and other drugs throughout this State and County.

10. Defendant Schering-Plough Corporation ("Schering") is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in Kenilworth, New Jersey. Schering is the manufacturer of numerous brand-name prescription drugs, including but not limited to the drugs K-Dur, Nitro-Dur, Normodyne, Proventil, Theo-Dur, Vancenase, Vancenase AQ, and Vanceril. Scher-

ing sells these and other drugs throughout this State and County.

11. Defendant SmithKline Beecham Pharmaceuticals Co. ("SmithKline") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Philadelphia, Pennsylvania. SmithKline is the manufacturer of numerous brand-name prescription drugs, including but not limited to the drugs Relafen and Tagamet. SmithKline sells these and other drugs throughout this State and County.

12. Whenever any reference is made in this Complaint to any corporate Defendant, the reference shall include any predecessors, successors, parents, subsidiaries, affiliates and divisions of that corporation.

III.
FACTUAL ALLEGATIONS APPLICABLE TO ALL COUNTS

13. This is a consumer class action involving the prescription drug industry and is brought pursuant to §§ 6-5-60 and §§ 8-10-1 *et seq.* of the Alabama Code. As set forth below, this action arises from the unlawful trust, combine or monopoly comprised of the defendant prescription drug manufacturers and the discriminatory and unlawful pricing structure, including the acts related to the imposition and maintenance of that structure, established by the Defendants.

14. Plaintiffs and all others similarly situated are consumers of brand-name prescription drugs who purchased such drugs from local retail drug stores and pharmacies (hereinafter sometimes referred to as "Plaintiffs and the Class"). These drug stores and pharmacies obtain the drugs they sell to Plaintiffs and the Class from the Defendants directly or indirectly.

15. During recent decades, the Defendants have consistently made extraordinarily and large profits from their prescription drug businesses. The excessive prices charged by defendants to drug stores and pharmacies for their brand-name products are a principal source of defendants' huge profits.

16. Because certain prescription drugs of one manufacturer compete with a prescription drug or drugs of another manufacturer or manufacturers, the high mark-ups that each manufacturer receives on its products depends in large part on defendants' adherence to the price structure they have established.

17. Retail pharmacies are not the only retail purveyors of prescription pharmaceutical drugs. Drugs are also sold by mail order vendors, by Health Maintenance Organizations (or "HMOs") and by other health care providers (sometimes referred to herein collectively as "HMO outlets").

18. Defendants' prices for prescription drugs sold to mail-order pharmacies and HMO outlets are substantially and discriminatorily less than the prices that defendants charge for the same prescription drugs sold to drug stores and pharmacies. The difference between the prices charged to mail-order pharmacies and to HMO outlets on the one hand and the prices charged to drug stores and pharmacies on the other hand is not justified by any differences in cost, economies of scale or otherwise.

19. The defendants' mutual adherence to the above-described tiered pricing structure permits the defendants to charge drug stores and pharmacies prices substantially more than competitive levels, and to increase profits thereby. The establishment and maintenance of this unreasonable and discriminatory pricing structure by defendants is an unlawful trust, combine or monopoly which has the effect of, and was created and carried out for the purposes of, unreasonably restricting trade and commerce in the prescription drug indus-

try, unjustifiably increasing the prices that plaintiffs and similarly situated consumers pay for prescription drugs purchased from drug stores and pharmacies, preventing competition in the sale of prescription drugs and maintaining the prices of prescription drugs sold in drug stores and pharmacies at artificially high levels. Every defendant is a member of this unlawful trust, combine or monopoly, and each defendant acted with or in pursuance of such unlawful trust, combine or monopoly, or aided and abetted in carrying out the purposes of such trust or combination.

20. Plaintiffs and the class are harmed by this unlawful trust, combine or monopoly in several ways. For example, plaintiffs and the class are forced to pay artificially high prices for prescription drugs because the drug stores and pharmacies are forced to buy the prescription drugs from Defendant Manufacturers at artificial and supracompetitive prices. Consumers are also deprived of the lower prices that would result from enhanced competition if drug stores and pharmacies were able to compete with HMO outlets and mail order pharmacies on a level playing field. In short, as a direct result of defendants' unlawful and discriminatory price structure, consumers pay higher prices for prescription drugs than they would if defendants' prescription drugs were priced competitively.

IV.
Class Action Allegations

21. Plaintiffs bring this action pursuant to Rule 23 of the Alabama Rules of Civil Procedure, on behalf of the following class of persons:

> All persons who, during the past two years, have purchased from a retail pharmacy or drug store located in the State of Alabama prescription drugs manufactured by one or more of the Manufacturer Defendants and who have not been reimbursed by an insurance company or

other third person for the cost of said prescription drugs. Excluded from the class are employees of any defendant and any alleged aider and abettor of any defendant.

22. The class is so numerous that joinder of all members is impracticable.

23. There are questions of law or fact common to the class.

24. The plaintiffs' claims are typical of the class members' claims.

25. Plaintiffs will fairly and adequately represent the interests of the class members. Plaintiffs are represented by counsel experienced in the prosecution of class actions and complex litigation.

26. This class action raises common questions of law or fact that predominate over any questions affecting only individual members, including but not limited to the questions whether (1) the defendants created, operated and carried out an unlawful trust, combine or monopoly as contemplated by Code §§ 6-5-607 [and 8-10-1]; and (2) whether the discriminatory pricing scheme established and maintained by defendants have had the purpose or effect of injuring or damaging consumers who have purchased drugs from local pharmacies and drug stores.

27. Many of the class members suffered small amounts of damages. In some cases the actual damages of individual class members are very small or even nominal. Accordingly, for many, if not most class members, no viable remedy other than a class action exists.

28. Plaintiffs' claims are typical of the claims of other purchasers of prescription drugs from their local pharmacies and drug stores.

COUNT I
(VIOLATION OF § 6-5-60, CODE OF ALABAMA)

29. The above-described discriminatory pricing structure constitutes an unlawful trust, combine or monopoly that was created and carried out for the purpose of presenting or restraining competition in the prescription drugs industry and maintaining the prices of prescription drugs at artificially high levels.

30. The Defendants' adoption, and adherence to, their discriminatory pricing structure and their refusal to offer local pharmacies and drug stores the prices, terms, and conditions offered to HMO outlets and mail-order pharmacies, constitutes *per se* illegal horizontal price fixing in the prescription drug industry in violation of Code §§ 6-5-60 and 8-10-1 *et seq*.

31. This unlawful horizonal trust, combine or monopoly and unreasonable restriction or restraint on trade and commerce in the prescription drug industry has caused, and continues to cause, substantial injury and damage to Plaintiffs and the Class.

WHEREFORE, plaintiffs pray for an Order against all Defendants awarding Plaintiffs and the Class damages in an amount to be determined at trial.

JURY DEMAND

Plaintiffs hereby demand a trial by jury on all claims.

Respectfully submitted,

/s/ HORACE G. WILLIAMS
Horace G. Williams
P.O. Box 896
Eufaula, AL 36072-0896
(205) 687-5834

/s/ DAVID R. DONALDSON [BY RRS, JR.]
David R. Donaldson
Ritchie & Rediker, P.C.
312 North 23rd Street
Birmingham, AL 35203
(205) 251-1288

/s/ RUFUS R. SMITH, JR.
Rufus R. Smith, Jr.
P.O. Drawer 6629
Dothan, AL 36302
(205) 671-7959

/s/ L. ANDREW HOLLIS, JR. [BY RRS, JR.]
L. Andrew Hollis, Jr.
Pittman, Hooks, Marsh, Dutton & Hollis
1100 Park Place Tower
Birmingham, AL 35203
(205) 322-8880

Appendix N

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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94 C 897

MDL 997

IN RE: BRAND NAME PRESCRIPTION
DRUGS ANTITRUST LITIGATION

This Document Relates to:

William Mack Price, et al. v. American
Home Products Corp., et al.,
M.D. Ala., C.A. No. 2:94-526

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on a motion for voluntary dismissal pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. The plaintiffs in the *Price v. American Homes Corp.* ("*Price* plaintiffs") seek dismissal of their action without prejudice. For the reasons that follow, the motion is denied.

DISCUSSION

The *Price* plaintiffs are a discrete group of plaintiffs alleging consumer antitrust injuries under Alabama State law. In November 1994, approximately seven months ago, we denied the *Price* plaintiffs' Rule 23(b)(3) motion for class certification based on the plaintiffs' failure to demonstrate that common questions of law or fact predominate over issues affecting individual members. Subsequently, the *Price* plaintiffs moved for a Rule 12(b)(1) order of dismissal, claiming that we lacked federal subject matter jurisdiction because the amount in controversy for each plaintiff did not exceed the requisite $50,000. On February 7, 1995 we denied the *Price* plaintiffs' motion to dismiss, finding that the plaintiffs' action was properly before this court. In our February 7, 1995 decision we remarked that "[s]hould the plaintiffs seek to voluntarily dismiss their action pursuant to Rule 41 of the Federal Rules of Civil Procedure, we would entertain such a motion. . . ." The *Price* plaintiffs took us to task and (over four months later) filed the motion presently before us.

Curiously, however, in their opening brief the plaintiffs offer no grounds in support of their Rule 41 motion to dismiss. Rather, in their initial memorandum the *Price* plaintiffs merely cite our February 7, 1995 ruling, and ask for an order of dismissal. Plaintiffs apparently interpreted our remark that we would "entertain" a Rule 41 motion to mean that we would "grant" such a motion. That is not so. Rule 41(a)(2) "requires the plaintiff to persuade the district court and to establish that voluntary dismissal without prejudice is warranted." *Tolle v. Corrol Touch, Inc.*, 23 F.3d 174, 177 (7th Cir. 1994).

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides in relevant part that after an adverse party has filed an answer or a motion for summary judgment, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." The pri-

mary purpose of the rule is to prevent voluntary dismissals that would affect the defense unfairly, and to permit the imposition of curative measures. *Hunter v. Surgitek/Medical Engineering,* 1992 WL 165819 *1 (N.D.Ind. May 29, 1992) (citations omitted). Thus, the court may refuse to grant a motion to dismiss without prejudice if the defendants will be unduly prejudiced. *Puerto Rico Maritime Shipping Authority v. Leith,* 668 F.2d 46 (1st Cir. 1981); *Stern v. Barnett,* 452 F.2d 211, 213 (7th Cir. 1971). Dismissal under Rule 41(a)(2) is within the trial court's sound discretion. *Tyco Laboratories, Inc. v. Koppers Company,* 627 F.2d 54, 56 (7th Cir. 1980).

Here, the Manufacturer Defendants strongly object to plaintiffs' motion for dismissal, suggesting that the real reason plaintiffs seek dismissal is to refile their action in another court so as to avoid the legal effect of this Court's decision denying class certification. While it is impossible to discern the *Price* plaintiffs' true intent, based on their reply memorandum and their actions following the class certification ruling, defendant's theory is not implausible. If, as defendants suggest, the true motive behind the *Price* plaintiffs' motion for dismissal is to circumvent our class certification ruling, the reason is illegitimate, and the motion must be denied, for "[u]favorable rulings by the district court is not an acceptable basis to grant voluntary dismissal or to facilitate the search for a perceivably more favorable state judicial climate," *Tolle,* 23 F.3d at 178.

The *Price* plaintiffs do not expressly deny that they are seeking dismissal for the purpose of circumventing our class certification ruling. They do, however, argue that they have a legitimate reason for seeking voluntary dismissal, claiming that the cost of pursuing individual claims in this court outweighs the benefit of any potential recovery. While this may be a legitimate reason, plaintiffs must still show that a dismissal without prejudice would not result in legal prejudice to the defendants.

Whether a voluntary dismissal is prejudicial to a defendant depends upon the circumstances of each case. In *Pace v.*

Southern Express Company, 409 F.2d 331 (7th Cir. 1969), the Seventh Circuit noted that the following factors may be considered in determining whether a dismissal without prejudice will result in legal prejudice to the defendant: "the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal and the fact that a motion for summary judgment has been filed by the defendant." *Id.* at 334. These factors are not mandatory, but rather are simply a guide for the court in exercising its discretion. *Kovalic v. DEC International, Inc.,* 855 F.2d 471, 474 (7th Cir. 1988).

Based upon our examination of all relevant factors and our familiarity with this action, we must conclude that a dismissal without prejudice would be improper at this late juncture. First of all, we agree with the defendants that the *Price* plaintiffs' proffered reason that this action cannot be economically pursued in this forum is questionable. On the one hand, the plaintiffs' claim that they cannot afford to litigate this action, yet on the other they concede that are being supplied with all of the discovery obtained in this docket by the Independent Pharmacy Plaintiffs.

More importantly, however, we believe that legal harm will result to the defendants if we were to grant the plaintiffs' motion. Specifically, the defendants will lose that beneficial effect of this Court's ruling on numerous motions and pretrial orders regarding discovery and experts, as well as this Court's ruling on class certification. In addition, discovery has been progressing at a rapid rate, with the close of discovery set for the end of this month. A voluntary dismissal without prejudice would allow the plaintiffs to avoid this deadline and, in a newly filed action, subject the defendants to discovery well beyond our August 31, 1995 cut-off date. Accordingly, we will not allow a dismissal without prejudice.

CONCLUSION

For the reasons set forth above, the *Price* plaintiffs' motion for an order of dismissal without prejudice is denied.

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
United States District Judge

Dated: August 10, 1995

Appendix O

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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94 C 897

MDL 997

IN RE: BRAND NAME PRESCRIPTION
DRUGS ANTITRUST LITIGATION

This Document Relates to:

William Mack Price, et al. v. American Home Products Corp., et al., M.D. Ala., C.A. No. 2:94-526

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the court on certain plaintiffs' motion for an order of dismissal pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The motion was filed by the named plaintiffs in a related Alabama consumer action entitled *William Mack Price v. American Home Products, et al.* For the reasons set forth below, the plaintiffs' motion for dis-

missal is denied. The plaintiffs alternative motion to remand the case is likewise denied.

BACKGROUND

Judge Price and Mrs. Jackson ("the Alabama plaintiffs" or "the plaintiffs") are Alabama consumers who purchased brand name prescription drugs. On April 1, 1994, they filed a class action lawsuit against seven drug manufacturers in Alabama state court. The defendants timely removed the case to federal court based upon diversity jurisdiction.[1] The plaintiffs did not move to remand the case. Instead, the plaintiffs proceeded to litigate their case in this court. On November 15, 1994, this court denied the Alabama plaintiffs motion for class certification. Subsequent to that ruling, on December 13, 1994, the plaintiffs filed the present motion to dismiss the case, or alternatively, to remand it to state court.

LEGAL STANDARD

The Alabama plaintiffs have filed their motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Rule 12(b)(1) provides for the dismissal of claims over which the federal court lacks subject matter jurisdiction. Jurisdiction is viewed as the "power to decide" and must be conferred upon the federal court. *In re Chicago, R. I. & P. R. Co.*, 794 F.2d 1182, 1188 (7th Cir. 1986). When the requested relief is dismissal for lack of subject matter jurisdiction, consideration of evidence outside of the pleadings is proper. *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993). Where it is established that a federal court is without subject matter jurisdiction, the action must be dismissed. Fed.R.Civ. P. 12(b)(3). We turn to the plaintiffs' motion with these principles in mind.

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[1] This case was originally removed to the United States District Court for the Middle District of Alabama. The Judicial Panel on Multidistrict Litigation then transferred it to this court.

DISCUSSION

Generally, jurisdiction exists in a removal action if the case initially might have been brought in federal court. *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972). The plaintiffs' case was originally filed in Alabama state court. It was subsequently removed to federal court on the basis of diversity jurisdiction. The plaintiffs did not challenge the removal at that time and proceeded to pursue their claims in the federal district court. The plaintiffs now assert that federal subject matter jurisdiction never existed because the amount in controversy for each plaintiff does not exceed the requisite $50,000.

Whether or not the defendants have the right to remove an action on the basis of diversity of citizenship is usually determined from the allegations contained within the complaint at the time of removal. *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939). However, this may not be so easily accomplished where, as here, the plaintiffs' complaint is ambiguous on account of state law. In such a case, removal is proper if the defendants can show to a reasonable probability that the amount in controversy exceeds the $50,000 threshold. *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366-67 (7th Cir. 1993).

The plaintiffs assert that the defendants have failed to sustain this burden and insist that the defendants cannot show that each of the plaintiffs in the Alabama action could recover in excess of $50,000. This argument might have had merit had the plaintiffs immediately objected to removal. The plaintiffs, however, did not object. Instead, they proceeded actively to litigate their claims in federal court. Attempts at dismissal or remand were not forthcoming until the Alabama plaintiffs were denied certification as a class many months later.

The Seventh Circuit has frowned upon such actions taken by disgruntled plaintiffs, declaring that "once removal has been perfected, plaintiffs may not manipulate the process to void the removal." *Shaw*, 994 F.2d at 368. As the Supreme Court has emphasized:

> If the plaintiff could, no matter how bona fide his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election.

St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938).

We conclude that, by not contesting removal when the motion was originally made, the plaintiffs conceded that their claims exceeded the $50,000 amount in controversy required to invoke diversity jurisdiction. The plaintiffs' case was therefore properly before this court at the time of removal and remains properly before this court. The plaintiffs motion to dismiss for lack of subject matter jurisdiction is denied, as is the plaintiffs' alternative motion for remand. Should the plaintiffs seek to voluntarily dismiss their action pursuant to Rule 41 of the Federal Rules of Civil Procedure, we would entertain such a motion without prejudice. *See United States v. Outboard Marine Corp.*, 104 F.R.D. 405, 409 (N.D.Ill. 1984) ("In general, dismissal [under Rule 41] should be allowed, unless the defendant will suffer some plain legal prejudice beyond the mere prospect of a second law suit.") (citing *Stern v. Barnett*, 452 F.2d 211, 213 (7th Cir. 1971)), *cert. denied*, 479 U.S. 961 (1986).

CONCLUSION

For the reasons set forth above, the plaintiffs' motion to dismiss or remand the case to the Alabama state court is denied.

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
United States District Judge

Dated: February 7, 1995

Appendix P

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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94 C 897

MDL 997

IN RE: BRAND NAME PRESCRIPTION
DRUGS ANTITRUST LITIGATION

This Document Relates to:

ALL CASES

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on two separate motions for certification of Plaintiff classes pursuant to Rule 23 of the Federal Rules of Civil Procedure. For the reasons that follow, the motion filed by class plaintiffs named in the Consolidated and Amended Class Action Complaint is granted; the motion filed by the plaintiffs named in the Alabama consumer action entitled *William Mack Price v. American Home Products, et al.*, is denied.

BACKGROUND

This action arises out of alleged anti-trust and price discrimination violations involving the brand name prescription drug industry. Over 400 retail pharmacies allege a conspiracy by numerous pharmaceutical product manufacturers and wholesalers to fix and/or stabilize the price of brand-name prescription drugs in violation of federal and/or state antitrust laws. More than 50 treble damage suits alleging such antitrust violations were filed throughout the country. Pursuant to orders of the Judicial Panel on Multidistrict Litigation ("MDL"), these actions were subsequently transferred to this court for coordinated or consolidated pretrial proceedings.

Earlier this year, certain "putative class action plaintiffs" named in the Consolidated and Amended Action Complaint ("Consolidated and Amended Complaint") moved to have their action conditionally certified as a class action pursuant to Rules 23(b)(3) and 23(c)(2) of the Federal Rules of Civil Procedure. On May 26, 1994 we denied the plaintiffs' motion, finding that it was premature and that discovery was needed to explore issues relevant to a class certification determination. We did, however, grant the putative class action plaintiffs leave to file another motion for class certification upon the completion of certain discovery. Now, having had an opportunity to pursue some discovery, the parties are before us once again. The putative class action plaintiffs, which consist of retail pharmacies and drug stores, move for the certification of a plaintiff class as defined as follows:

> All persons and entities in the United States who, at any time during the period from October 15, 1989, to the present, purchase or purchased prescription brand name drugs directly from any of the defendants. The class excludes defendants; other manufacturers of prescription brand name drugs; other wholesalers of prescription brand name drugs; co-conspirators of any of the foregoing entities; affiliates, parents, and subsidiaries of any of the foregoing entities; governmental entities; mail

> order pharmacies; health maintenance organizations; hospitals; clinics; and nursing homes.

In addition to the motion filed by the plaintiffs in the Consolidated and Amended Complaint, another group of plaintiffs move for the certification of a separate plaintiff class. Plaintiffs in an Alabama consumer antitrust action entitled *William Mack et al. v. American Home Products Corp., et al.*, M.D. Ala, C.A. No. 2:94-526, move for the certification of a plaintiff class as defined as follows:

> All persons who, during two years preceding the filing of the Complaint in the above-styled action, have purchased from a retail pharmacy or drug store located in the State of Alabama prescription drugs manufactured by one or more of the Manufacturer Defendants and who have not been reimbursed by an insurance company or other third person for the cost of said prescription drugs.

There are two significant differences between the Alabama plaintiffs' allegations and putative class action plaintiffs' allegations. First, the Alabama plaintiffs do not assert violations of federal antitrust law, but rather, only assert claims under the Alabama antitrust statute, alleging multiple violations of the Alabama code § 6-5-60. Second, while the putative class action plaintiffs consist of retail pharmacies and drug stores, the Alabama action is a consumer suit.

The defendants strongly oppose both motions, maintaining, inter alia, that individual issues predominate over common questions of law or fact. The parties' respective contentions will be addressed below.

LEGAL STANDARD

The party seeking to maintain an action as a class action has the burden of establishing that each of the requirements for class certification have been satisfied. *Spencer v. Central States Southeast & Southwest Areas Pension Fund,* 778

F.Supp. 985, 989 (N.D.Ill. 1991); *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). For an action to appropriately proceed as a class action, the suit must satisfy all of the criteria of Rule 23(a) of the Federal Rules of Civil Procedure, and a least one of the subsections of Rule 23(b). *Spencer*, 778 F.Supp. at 989. The four preliminary requirements of Rule 23(a) are as follows:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

Here, both groups of plaintiffs seek certification under Rule 23(b)(3). Thus, in addition to establishing that they met the requirements of Rule 23(a), the plaintiffs must respectively show "that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." F.R.Civ.P. 23(b).

DISCUSSION

I. Putative Class Action Plaintiffs' Motion for Class Certification

A. Whether the class satisfies the prerequisites of Rule 23(a)

Upon reviewing the parties' respective submissions it is evident that the putative class action plaintiffs in the Consolidated and Amended Complaint have satisfied their burden of establishing each of the four requirements of Rule 23(a).

First, to fulfill the numerosity requirement of Rule 23(a)(1) the plaintiffs must show that the class is so numerous that joinder of all members is impracticable. The class which the putative class action plaintiffs seek to represent consists of approximately 50,000 retail pharmacies located throughout the United States. Defendants do not contend, nor can they, that joinder of 50,000 widely dispersed parties would be impracticable.

Second, under Rule 23(a)(2) the plaintiffs must show that there are questions of law or fact common to the class. As our discussion below in connection with the requirements of Rule 23(b)(3) demonstrates, there are questions of law and fact common to the class. Specifically, the existence and scope of the alleged conspiracy among the defendants to unlawfully raise, fix and maintain prices of brand name prescription drugs at supra-competitive levels are questions common to all class members. *In Re: Fine Paper Antitrust Litigation*, 82 F.R.D. 143, 150 (E.D.Pa. 1979), *aff'd* 685 F.2d 810 (3d. Cir 1982); *Transamerican Refining Corp. v. Dravo Corp.*, 130 F.R.D. 70, 73 (S.D.Tex. 1990).

Next, Rule 23(a)(3) provides that a class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." To satisfy the typicality requirement the putative class action plaintiffs must show that their claims "stem from the same event, practice or course of conduct that form the basis of the class claims and [are] based on the remedial theory." *Transamerican Refining*, 130 F.R.D at 73 (citing 7A Wright, Miller & Kane, Federal Practice and Procedure, § 1764 at 228 (1986). *Accord Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 548, 596-97 (7th Cir. 1993).

The defendants maintain that the class representatives' claims are not typical of the class because the alleged class consists of "an amalgam of diverse businesses, facing different competitive environments and paying widely differing prices." Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification at 11. According to the

defendants, the plaintiffs' "significantly different business practices" preclude a finding of typicality because the impact of the alleged conspiracy will vary greatly depending upon each retail pharmacy's peculiar business practice.

As we see it, the factual variations in plaintiffs' methods of business operation does not dilute the typicality of their common claim of a conspiracy to fix, and/or stabilize the price of brand-name prescription drugs in violation of antitrust laws. The legal substance and theory of the putative class plaintiffs' claim—i.e. proof of a conspiracy and its effectuation—are the same. *See Durrell v. United States Football League*, 1987 U.S.Dist.Lexis 330 *6 (N.D.Ill. January 16, 1987) ("[W]hen a plaintiff's claim is typical, the plaintiff and each member of the class have an interest in prevailing on similar legal claims."). Accordingly, we find that the putative class plaintiffs have satisfied Rule 23(a)(2)'s typicality requirement.

Finally, Rule 23(a)(4) provides that the class representatives must "fairly and adequately protect the interests of the class." Generally this requires a showing that there is: "(1) an absence of conflicting interests between the representative and the class members; (2) an attorney who is qualified, experienced, and generally able to conduct the litigation; and (3) a representative who will vigorously prosecute the rights of the class." *Id.*

According to the defendants, the plaintiffs cannot satisfy Rule 23(a)(4) because there are conflicting interests between the representative and the class members.[1] Specifically, it is the defendants' contention that there is a conflict between "small 'independent pharmacies' with one or two stores, and the chains—including large chain drugstores[,]. . . chain supermarkets and mass merchandisers." Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification at 9. In support, the defendants state that both class counsel and named plaintiffs have asserted that small phar-

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[1] The defendants apparently do not take issue with the qualifications of counsel, nor do they question whether the representatives will vigorously prosecute the rights of the class.

macies are victims of price discrimination in favor of chains. Moreover, the defendants state that general business antagonisms exist between chains and independent pharmacies as a result of the chains' competitive benefits derived from their advantages of size and structure. We reject the defendants' argument, for regardless of what may have been said by named plaintiffs,[2] or counsel for that matter, the Consolidated and Amended Class Action Complaint does not challenge the legality of a purported price differential between independent pharmacies and chains. *See In re Fine Paper*, 82 F.R.D. at 151 ("[D]efendants cannot create a conflict of interest based upon the existence of a conspiracy that is not posited by plaintiffs in their complaints."). The complaint does not identify chains as favored purchasers, but rather as victims. Accordingly, Defendants' argument as to the existence of an intra-class conflict is presently irrelevant.

B. Whether the class satisfies the prerequisites of Rule 23(b)(3)

We now turn to what we consider to be the defendants' point of contention on the issue of class certification: whether the plaintiffs have demonstrated that common questions of law or fact predominate over issues affecting individual members, and whether a class action is the superior method for the "fair and efficient" adjudication of this controversy. F.R.Civ.P. 23(b)(3).

According to the defendants, individual issues regarding the extent that each class member was impacted by the alleged conspiracy predominate over questions of law or fact

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[2] *See Eggleston v. Chicago Journeymen Plumbers' Local Union*, 657 F.2d 890, 896 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) ("[T]he class representative's role is limited. It was found not to be enough to defeat class certification in *Surowitz v. Hilton Hotels*, 383 U.S. 363, 366 (1966), that the named plaintiff did not understand her complaint at all, could not explain the statements in it, had little knowledge of what the lawsuit was about, did not know the defendants by name, nor even the nature of the misconduct of the defendants").

common to the class. The defendants also contend that the heterogeneous nature of "brand name prescription drugs" presents an "insuperable impediment" to a common proof of impact, and further assert that there is no realistic basis for class-wide proof of damages.

Defendants' arguments are unavailing. Clearly common issues of fact and law abound as to the defendants' conduct, that is, whether the defendants conspired to fix prices. We note that arguments similar to those posited by defendants regarding the individualized nature of the industry, have been considered and rejected by courts ruling on class certification:

> We are likewise unpersuaded by defendants' argument that the nature of the folding carton industry makes it impossible for common issues to predominate. First, contentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected. Courts have consistently found the conspiracy issue the overriding, predominant question. (citation omitted). . . . [E]ven if the folding carton industry were as defendants have portrayed it, "[t]he highly individualized nature of work in the [folding carton] industry does not necessarily preclude the possibility of a common conspiracy among the defendants to limit price competition among them." (citation omitted).

In re Folding Carton Antitrust Litigation, 75 F.R.D. 727, 734 (N.D.Ill. 1977). *Accord In Re: Fine Paper Antitrust Litigation*, 82 F.R.D. 143, 151 (E.D.Pa. 1979).

Moreover, we are not persuaded that individual issues regarding impact and damages predominate. Proof of the merits of the plaintiffs' claim will not be contingent upon an individualized analysis of each and every transaction between each plaintiff and each defendant. Rather, a liability determination will, as suggested by the plaintiffs, hinge upon a showing of industry-wide practices, meetings, policies and agreements. Accordingly, despite the heterogeneous nature of "brand name prescription drugs" the fact of an antitrust injury

is a common, predominate question which is susceptible to common class-wide proof. *See In re Folding Carton*, 75 F.R.D. at 734 (recognizing that "an illegal price fixing scheme presumptively impacts upon all purchasers of a price fixed product is conspiratorially affected market").

Likewise, the plaintiffs have negated to our satisfaction defendants' claim that there is no class-wide formula for proving damages. Plaintiffs have come forward with a number of different methodologies that can be used in proving damages/injury on a class wide basis. *See* Robert E. Lucas Affidavit, Exhibit 3 to Plaintiffs' Reply Memorandum in Support of Motion for Class Certification; Albert Madansky Affidavit, Exhibit 2 to Plaintiffs' Reply Memorandum in Support of Motion for Class Certification. Each party takes great liberty in attacking the other's expert opinions. Defendants in particular claim that Plaintiffs' experts' methodologies are too complex, and do not account for multiple "extraneous variables." However, "the federal courts have consistently and firmly adhered to the principle that once liability has been demonstrated, complexity or uncertainty as to the amount of damages will not preclude recovery." *In re Folding Carton*, 75 F.R.D. at 735 (citing *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) and other cases). Nor do we believe that the possible complexity of a damage calculation should preclude class certification. The fact of the matter is that the putative class plaintiffs have come forward with seemingly realistic methodologies for proving damages on a class-wide basis. Assuming that liability is established, if a damage determination must be made on an individualized basis there are a number options available to the court (i.e. references to a magistrate and creation of subclasses) which can help simplify the process. *Id.*

In the same vein, the defendants contend that the involvement of the Defendant Wholesalers in this matter creates an obstacle to certification because "[i]f a class were certified, there would have to be over 100 mini-trials concerning the involvement of every wholesaler in the United States." Defen-

dant's Memorandum in Opposition to Plaintiffs' Motion for Class Certification at 12. We do not agree, for the plaintiffs are not alleging a series of separate vertical conspiracies between the Manufacturer Defendants and the Wholesaler Defendants. Rather, the plaintiffs are seeking to prove the existence of a system of price discrimination in which all of the wholesalers participated in essentially the same way. *See* Plaintiffs' Reply Memorandum in Support of Motion for Class Certification at 14. To this end, class-wide evidence of showing a pattern of involvement can be used.

Finally, the defendants assert that a class action is not the superior means of manageably adjudicating the plaintiffs' claims in light of the "enormous number of individual actions that must be litigated in any event." We fail to see the logic in defendants' contention that 50,000 individual actions are less complex than a single class action. Notwithstanding, as we noted above the individual issues which this case poses are eclipsed by common questions of law and fact which are susceptible to class treatment.

In sum, we find that the Defendants' depiction of the brand name prescription drug industry does not negate the common, predominating question of whether defendants conspired to fix prices. Moreover, we are unpersuaded that individual issues such as impact and damages predominate over the primary issues surrounding the defendants' allegedly wrongful conduct. Accordingly, we find that the putative class action plaintiffs in the Consolidated and Amended Class Action Complaint have satisfied all of the prerequisites of Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure.[3]

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[3] We add as a final note that the Defendants' arguments concerning indirect purchasers issues raised under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), are moot in light of our recent decision denying various motions for summary judgment. *See In Re: Brand Name Prescription Drugs Antitrust Litigation*, Slip Op. No. 94C897 / MDL 997 (October 18, 1994).

II The Alabama Plaintiffs' Motion for Class Certification

A discrete group of plaintiffs alleging consumer antitrust injuries under Alabama state law also move for class certification. The Alabama plaintiffs' action differs from the action asserted in the Consolidated and Amended Complaint in that the Alabama plaintiffs are alleging a consumer injury under Alabama state law. Specifically, the Alabama plaintiffs seek to prove that the manufacturer defendants, "directly or indirectly, engaged, through a common course of conduct, in a combination, pool, trust, or confederation to regulate the prices of prescription drugs, maintain such prices at artificially high levels, and thereby stifle competition and earn unconscionably large profits at the expense of Alabama consumers". [Alabama] Plaintiffs' Response to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification at 7.

Upon reviewing the parties' respective submissions, we find that the Alabama plaintiffs have failed to satisfy all of the prerequisites to class certification under Rule 23 of the Federal Rule of Civil Procedures. In particular, the Alabama plaintiffs have failed to demonstrate that common question of law or fact predominate over issues affecting individual members, and a class action is the superior method for the "fair and efficient" adjudication of this controversy. F.R.Civ.P. 23(b)(3). Unlike the plaintiffs in the Consolidated and Amended Complaint discussed above, plaintiffs in the Alabama action have failed to show that they can establish the fact of injury and damages through common proof on a class-wide basis. The Alabama plaintiffs' failure in this regard stems from the fact that the plaintiffs are alleging indirect purchaser claims, with an alleged injury far more removed than the injury alleged in the Consolidated and Amended Complaint. The plaintiffs in the Alabama action are not pharmacies and drug stores that purchased directly from either Defendant Manufacturers or Defendant Wholesalers of brand name prescription drugs. Rather, the Alabama plaintiffs are consumers who purchased brand name prescription drugs

from retail pharmacies, entities that are not alleged co-conspirators.

One Alabama court has recently received and rejected arguments similar to the ones presently before us. The court in *McCarter v. Abbott Laboratories, Inc.*, No. CV-91-050 (Ala. Cir.Ct. April 14, 1993), denied a class certification motion by indirect purchasers of infant formula finding that individualized issues regarding the impact of, and damages from a conspiracy alleged under the same Alabama statute predominated over common issues of law or fact. In reaching its decision, the *McCarter* court observed that:

> Typical antitrust class actions involve direct purchasers, all of whom bought from the defendants at an alleged commonly inflated price. Such direct purchasers are, therefore, able to offer common proof of fact and damages. Here, however, whether a particular consumer has in fact been injured will depend entirely upon whether the alleged conspiracy resulted in overcharges that were "passed on" to that consumer by retailers and others in the chain of distribution.

Id. at 6. Here, as in *McCarter*, tracing the alleged overcharges from manufacturers, to wholesalers, to retailers, to consumers presents individualized issues which would dominate this litigation and preclude certification under rule 23(b)(3). Accordingly, the Alabama plaintiffs' motion for class certification is denied.

CONCLUSION

For these foregoing reasons, the motion filed by class plaintiffs named in the Consolidated and Amended Class Action Complaint is granted; the motion filed by the plaintiffs named in the Alabama consumer action entitled *William Mack Price v. American Home Products, et al.*, is denied.

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
United States District Judge

Dated: November 15, 1994

Supreme Court, U.S.
FILED
DEC 12 1997
CLERK

No. 97-775

In The

Supreme Court of the United States

October Term, 1997

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,

ABBOTT LABORATORIES, *et al.*,

Petitioners,

vs.

ROBERT A. HUGGINS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL D. HAUSFELD
Counsel of Record
DANIEL A. SMALL
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
Attorneys for Respondent
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
(202) 408-4600

72659 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

PARTIES TO THE PROCEEDING

The petition fails to identify the following parties, who were appellants in the court of appeals: Paul Cady and Kenneth Karofsky.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Citations	iv
Statement of Jurisdiction	1
Statement of the Case	1
A. The Procedural History of This Case	1
B. The Procedural History of the *Price* Case	2
C. The Issue Before This Court in *Rivet*	4
D. The Seventh Circuit's Decision	6
Reasons for Denying the Writ	8
I. Introduction	8
II. Petitioners' Collateral Estoppel Version Of Artful Pleading Does Not Merit This Court's Review.	9
A. This Court Should Not Consider A Form Of Artful Pleading That Has Not Been Recognized By Any Court.	10

Contents

Page

B. Petitioners' Interpretation Of The Federal Question Statute Does Not Merit Further Judicial Consideration Because It Is Contrary To Sound Judicial Policy. 11

C. Because Petitioners' Policy Arguments Are Irrelevant To A Proper Interpretation Of The Removal And Federal Question Statutes, They Furnish No Reason To Grant The Petition. 14

III. Petitioners' Alternative Artful Pleading Argument Does Not Warrant Supreme Court Review. 16

A. The Petition Should Be Denied Because No Appellate Court Has Accepted Petitioners' Alternative Interpretation of *Moitie*. 17

B. Because Petitioners Seek To Expand The Artful Pleading Doctrine Far Beyond The Limited Scope Recognized By This Court, The Petition Should Be Denied. 17

C. The Petition Should Be Denied Because It Relies On District Court Cases That Conflict With *ARC America*. 18

D. The Petition Should Be Denied Because Respondent Has No Federal Antitrust Claim On Which To Base Federal Question Jurisdiction. 19

Contents

Page

E. Petitioners' Alternative Argument Is Not A Sound Interpretation Of The Federal Question Statute. 20

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Amalgamated Clothing Workers v. Richman Brothers Co., 348 U.S. 511 (1955) 16

Bell v. Hood, 327 U.S. 678 (1946) 21

California v. ARC America Corp., 490 U.S. 93 (1989) 17, 18, 19

Carpenter v. Wichita Falls Independent School Dist., 44 F.3d 362 (5th Cir. 1995) 14

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 18

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 16

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 14

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 5, 7, 8, 9, 10, 11, 16, 17, 18

Contents

	Page
Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983)	20
Healy v. Ratta, 292 U.S. 263 (1934)	13
Heck v. Humphrey, 512 U.S. 477, 129 L. Ed. 2d 383 (1994)	15
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	19
In re Brand Name Prescription Drugs Antitrust Litigation, MDL No. 997	2
In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997)	6, 10
In re Sugar Antitrust Litig., 588 F.2d 1270 (9th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979)	20
In re Wiring Device Antitrust Litig., 498 F. Supp. 79 (E.D.N.Y. 1980)	19
Montana v. United States, 440 U.S. 147 (1979)	15
Price v. American Home Products, et al., 94 C 897 (N.D. Ill.)	2, 3, 4, 6, 7, 9, 15
Rivet v. Regions Bank of Louisiana, F.S.B., 108 F.3d 576 (5th Cir.), *cert. granted*, __ U.S. __, 118 S. Ct. 31 (1997)	4, 5, 6, 8, 10

Contents

Page

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 11, 13

Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423 (9th Cir. 1984) 13

Sullivan v. First Affiliated Securities, Inc., 813 F.2d 1368 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 14

Travelers Indem. Co. v. Sarkisian, 794 F.2d 754 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986) 10

Ultramar America, Ltd. v. Dwelle, 900 F.2d 1412 (9th Cir. 1990) 10

United Jersey Banks v. Parell, 783 F.2d 360 (3d Cir.), *cert. xdenied*, 476 U.S. 1170 (1986) 13

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(b) 1, 2

28 U.S.C. § 1331 ..... 8, 9, 20

28 U.S.C. § 1407 2

28 U.S.C. § 1441 14

28 U.S.C. § 2101(c) 1

Contents

Page

Rule Cited:

Fed. R. Civ. P. 12(b)(1) 4

APPENDIX

Appendix A — Excepts from *Rivet* Petition 1a

STATEMENT OF JURISDICTION

The district court lacked subject matter jurisdiction. The court of appeals exercised appellate jurisdiction pursuant to 28 U.S.C. § 1292(b). The court of appeals denied Petitioners' petition for rehearing on October 8, 1997. This Court has discretionary jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition for writ of certiorari was timely filed under 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

A. The Procedural History of This Case

On January 26, 1996, Respondent Robert A. Huggins filed a complaint in the Circuit Court of Clarke County, Alabama on behalf of himself and a class of consumers who, during the period 1991 to the filing of the complaint, purchased brand name prescription drugs manufactured by Petitioners from independent retail pharmacies in Alabama and other states (and the District of Columbia) that have antitrust statutes that permit damages actions by indirect purchasers. *Huggins* Complaint ¶ 47 (App. 84a). The complaint alleges that beginning before May 1990 Petitioners conspired to fix prices of brand name prescription drugs. *Huggins* Complaint ¶ 75 (App. 91a). The complaint seeks recovery solely under state antitrust law. *Huggins* Complaint ¶¶ 1, 3, 4, 81 (App. 74a, 75a, 93a). No claim is made under the federal antitrust laws (or any other federal law) because, as an indirect purchaser, Huggins cannot obtain relief under the federal antitrust laws. *Huggins* Complaint ¶ 3 (App. 75a).

On February 29, 1996, Petitioners removed the case to the United States District Court for the Southern District of Alabama, asserting both diversity and federal question jurisdiction. On March 11, 1997, Respondent moved the

Alabama district court to remand the case to state court. While the remand motion was pending, the Judicial Panel on Multidistrict Litigation, on March 13, 1996, entered a conditional order to transfer this case under 28 U.S.C. § 1407 to the Northern District of Illinois. Over Respondent's opposition, the case was transferred by the Panel on June 5, 1996 for consolidation with the other cases pending in *In re Brand Name Prescription Drugs Antitrust Litigation*, MDL No. 997.

On July 31, 1996, Respondent filed a remand motion in the transferee court, which denied the motion on October 1, 1996 ("Oct. 1 Order"). With respect to federal question jurisdiction, the district court concluded, based on the artful pleading doctrine, that, even though Respondent brought this case under state antitrust law, Respondent had really pled a federal antitrust claim. The district court reasoned that Respondent's claim arose from Petitioners' interstate anticompetitive activity, and that the federal antitrust laws, but not the Alabama antitrust laws, provide redress for such interstate activity. Oct. 1 Order (App. 56a-59a). The court did not discuss, much less accept, Petitioners' argument that Respondent had engaged in artful pleading by attempting to avoid the allegedly preclusive effect of an order denying class certification in another case.

Pursuant to 28 U.S.C. § 1292(b), Respondent moved the district court for leave to appeal the October 1 order immediately. In an order dated December 16, 1996, the district court granted the motion with respect to, *inter alia*, the federal question jurisdiction issue. The Seventh Circuit granted Respondent's § 1292(b) petition on May 7, 1997 and on August 15, 1997 reversed in a unanimous opinion by Chief Judge Posner.

B. The Procedural History of the *Price* Case

Before this case was commenced, William Price and Jennifer and Neal Jackson filed a class action complaint in the

Circuit Court of Barbour County, Alabama on behalf of consumers who purchased certain brand name prescription drugs from retail pharmacies in Alabama. *Price v. American Home Products, et al.*, 94 C 897 (N.D. Ill.) ("*Price*"). Like this case, *Price* was brought solely under state antitrust law against certain drug manufacturers for price fixing. Unlike this case, *Price* alleges a conspiracy of no specified time period and limits the class to purchasers from Alabama retail pharmacies during the two years preceding the filing of the lawsuit. None of the counsel that filed the *Price* complaint is on the *Huggins* complaint. *Compare Huggins* Complaint, signature page (App. 94a) *with Price* Complaint, signature page (App. 106a).

The defendants in *Price*, which are seven of the Petitioners in this case, removed the case to a federal district court in Alabama solely on the ground of diversity jurisdiction. *See* February 7, 1995 Memorandum Opinion ("Feb. 7 Opinion") (App. 113a). The *Price* defendants *did not assert federal question jurisdiction, even though, as they now trumpet in this Court, Price is based on the very same interstate conspiracy alleged in this case. See Huggins* Petition for Writ of Certiorari at 5 ("The allegations in the *Huggins* Complaint are virtually identical to those in *Price*"). Petitioners are now requesting this Court to find the issue of federal question jurisdiction worthy of review in this case, when seven of them did not find such jurisdiction worthy of asserting in their removal petition in *Price*. Petitioners offer no explanation for their failure in *Price* to even advance federal question jurisdiction as a basis for removal.

After removal to federal court, *Price* was transferred to the Northern District of Illinois and became a part of the MDL proceedings there. The district court there denied the *Price* plaintiffs' class certification motion on November 15, 1994 ("Nov. 15, 1994 Order"). The court found that the plaintiffs had "failed to demonstrate" that common questions predominated or that a class action was the superior method for deciding the

controversy. Nov. 15 Order (App. 127a). According to the district court, "tracing the alleged overcharges from manufacturers, to wholesalers, to retailers, to consumers present[ed] individualized issues which would dominate th[e] litigation." *Id.* (App. 128a). The district court did not rule out the possibility that the passing-on of overcharges could be proved in a manner that would not cause individual issues to predominate. The court simply ruled that the *Price* plaintiffs had not done so.

After their class motion was denied, the *Price* plaintiffs moved to dismiss their action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. They argued that diversity jurisdiction was absent because the amount in controversy did not exceed the requisite $50,000. The district court acknowledged that the argument "might have had merit had the plaintiffs immediately objected to removal." Feb. 7 Opinion (App. 114a). Nonetheless, the court held that "by not contesting removal when the motion was originally made, the plaintiffs conceded that their claims exceeded the $50,000 amount. . . ." *Id.* (App. 115a). *Price* remains pending in the district court; no judgment has been entered on any claim in that case.

C. The Issue Before This Court in *Rivet*

In *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576 (5th Cir.), *cert. granted*, __ U.S. __, 118 S. Ct. 31 (1997), the plaintiffs filed claims under Louisiana law to have their rights under a second mortgage recognized and enforced or, alternatively, to recover damages. 108 F.3d at 582. The defendants removed the case to federal court on the ground of federal question jurisdiction. *Id.* It was undisputed that the plaintiffs could not have stated a federal claim to enforce their alleged rights under the mortgage. The Fifth Circuit, over the dissent of Judge Jones, upheld the district court's assertion of federal question jurisdiction based on the artful pleading

doctrine. The majority concluded that the plaintiffs had engaged in artful pleading because their state law claims were barred by the res judicata effect of a federal bankruptcy court order canceling their mortgage. *Id.* at 586.

Judge Jones dissented because in her view the majority had read footnote 2 of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) too broadly. She would have limited artful pleading under *Moitie* to a situation where a plaintiff unsuccessfully pursues a federal claim in federal court and then, based on the same facts, files a state law claim in state court. Because the plaintiffs had not filed any claim in the bankruptcy proceeding and could not have stated a federal claim based on the facts underlying their state law claim, Judge Jones dissented. *Id.* at 593-94. She criticized the majority for holding that "a *conceivable federal claim is not necessary for removal*, as long as there is a federal defense of res judicata based on a federal judgment," *id.* at 595 (emphasis in original), and concluded that

> [t]o say that a plaintiff's claim can be removed to federal court when he has alleged no conceivable federal claim is true mockery of the well-pleaded complaint rule and the artful pleading doctrine.

Id.

The issue before this Court in *Rivet* is whether, in an action brought in state court under state law, removal jurisdiction can rest on the preclusive effect of a prior federal judgment even though the state-court plaintiff did not file a federal claim in the federal action and has no conceivable federal claim. Excerpts from *Rivet* Petition for Writ of Certiorari (R. App. 3a). Thus, whether this Court affirms or reverses in *Rivet* will have no bearing on the proper disposition of this case. *Rivet* requires this Court to decide the precise scope of the res judicata form

of artful pleading. There is no dispute in *Rivet*, however, that an essential element of that type of artful pleading, whatever its proper scope, is a federal judgment. Here, it is undisputed there is no judgment in *Price* or any other federal case that could be res judicata in this lawsuit. No reason exists, therefore, to grant *certiorari* and vacate the decision below for further consideration in light of *Rivet*.

D. The Seventh Circuit's Decision

The Seventh Circuit extensively analyzed the artful pleading doctrine on which the district court had relied in purporting to exercise federal question jurisdiction over this case. The circuit court observed that

> [t]he doctrine is usually taken to mean that if federal law has so far occupied a field of disputes as to extinguish any basis in state law for seeking a resolution of the dispute, a plaintiff cannot prevent removal by casting his claim as one under state law — it must actually be a claim under federal law because only federal law could supply a ground for relief.

In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 611 (7th Cir. 1997) (App. 18a). The court then stated that the doctrine was difficult to confine within reasonable limits because of the "countless cases in which a suit under state law could be thought to be a federal suit in state clothing," *id.* (App. 19a), and noted that Petitioners were arguing that

> *any* time an antitrust plaintiff brings a suit in state court under a state antitrust statute that contains substantive provisions similar to that of a federal antitrust statute, the defendant can remove on the

> ground that the plaintiff is trying to bring a federal antitrust suit yet to insulate it from removal to a federal court.

Id. (App. 19a-20a) (emphasis in original).

In rejecting Petitioners' argument, the court of appeals carefully considered *Moitie*'s footnote 2. The court noted that the plaintiffs in *Moitie* had engaged in artful pleading by "trying to dodge a federal court's judgment," *id.* at 612 (App. 21a), and, contrary to Petitioners' suggestion that the Seventh Circuit gave the case no meaning, interpreted *Moitie* to mean that

> if the sole basis for filing a state suit is to get around, however temporarily and hopelessly, a federal judgment, it can be argued that the new "state law" suit is really the old federal suit in a transparent guise and that the federal court ought to say so in order to get rid of it quickly and thus protect the federal judgment against the possibility that the state court might abet the plaintiff's effort to get around a dispositive defense or other fatal flaw in his federal case.

Id. (App. 21a). The Seventh Circuit pointed out that here, in contrast to *Moitie*, there was no federal judgment for Respondent to avoid. The court acknowledged that the class motion in *Price* had been denied, but found that immaterial because "the denial of class certification is not a final judgment, terminating the underlying suit; the suit continues, only as an individual action rather than as a class action." *Id.* (App. 21a).

Next, the court considered Petitioners' argument that Respondent had engaged in artful pleading by attempting to obtain relief under the Alabama antitrust statute for an interstate

conspiracy. The court disagreed with Petitioners that an interstate conspiracy could only be redressed under federal antitrust law, interpreting the Alabama statute to reach unlawful transactions in interstate commerce. *Id.* at 612-13 (App. 22a-23a).

Finally, the court of appeals stated that *Moitie*'s footnote 2 should be narrowly construed, reasoning as follows:

> The twist that *Moitie* gave to the [artful pleading] doctrine is (very uncharacteristically for its author, Justice, now Chief Justice, Rehnquist) based on distrust of state courts, and, especially since it appears only in a footnote, should be narrowly construed in the interest of maintaining comity between the federal government and the states and keeping federal jurisdiction within the limits prescribed by Congress.

Id. at 613 (App. 23a).

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

Petitioners ask this Court to decide whether this case, brought solely under state law, presents a federal question for purposes of 28 U.S.C. § 1331. Petitioners argue that Respondent's state antitrust claim actually arises under federal law: (1) because of the allegedly preclusive effect of a federal court procedural ruling in another case; and (2) because Respondent has alleged facts that can only state a federal antitrust claim. Petitioners assert that their petition should be granted because these two issues, in conjunction with those presented in *Rivet*, would permit this Court to fully clarify the meaning of *Moitie*'s footnote 2.

The petition should be denied, however, because no court of appeals has interpreted *Moitie*'s footnote 2 to support either of Petitioners' arguments. The four circuits that have addressed footnote 2 have all interpreted it far more narrowly than do Petitioners. In addition, the petition should be denied because Petitioners give no reason worthy of Supreme Court review for interpreting footnote 2 far more expansively than any of these four appellate courts. To the contrary, there are compelling reasons, discussed below, not to accept Petitioners' invitation to greatly expand the artful pleading doctrine.

II.

PETITIONERS' COLLATERAL ESTOPPEL VERSION OF ARTFUL PLEADING DOES NOT MERIT THIS COURT'S REVIEW.

Petitioners ask this Court to review this case and hold that, although Respondent asserts only a state law claim in this case, because of a procedural ruling by a federal court in another ongoing case, this action arises under federal law for purposes of 28 U.S.C. § 1331. Petitioners argue that Respondent filed this case in state court under state law to avoid the allegedly preclusive effect of the class certification ruling in *Price,* and by doing so, Respondent has somehow transformed his state law claim into a federal claim. While some courts, on authority of *Moitie*, have applied the artful pleading doctrine based on the res judicata effect of a federal judgment, *no* court to Respondents' knowledge has applied the doctrine based on the collateral estoppel effect of a federal procedural ruling. Given this complete absence of judicial precedent, Petitioners' collateral estoppel version of artful pleading does not merit this Court's review. In addition, the petition should be denied because Petitioners' novel approach represents an unsound interpretation of the federal question statute, and Petitioners' policy justifications are inapposite.

A. This Court Should Not Consider A Form Of Artful Pleading That Has Not Been Recognized By Any Court.

No court to Respondent's knowledge has adopted a collateral estoppel form of artful pleading. The four circuit courts that have considered *Moitie*'s footnote 2 have interpreted the footnote narrowly. The Fifth, Seventh and Ninth Circuits have held *Moitie*'s artful pleading doctrine to apply where the state law claim is barred by the res judicata effect of a prior federal judgment. *Brand Name Prescription Drugs*, 123 F.3d at 610-13 (App. 18a-24a); *Rivet*, 108 F.3d at 583-86 & n.36; *Ultramar America, Ltd. v. Dwelle*, 900 F.2d 1412, 1414-17 (9th Cir. 1990). The Second Circuit has held that the *Moitie* artful pleading doctrine applies when the state-court plaintiff previously filed virtually the same claim under federal law in federal court. *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 760 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986). Here, it is undisputed that no federal judgment exists that could be res judicata in this case, and that Respondent never brought a federal court action. Thus, none of the four circuit court decisions supports Petitioners' collateral estoppel form of artful pleading.

It is irrelevant that the four courts of appeal have not construed *Moitie*'s footnote 2 identically, and that some courts have professed difficulty understanding the footnote. Petitioners' collateral estoppel argument is not within the parameters of the circuit court debate. As noted above, none of the appeals courts has construed *Moitie* to encompass a collateral estoppel type of artful pleading and none has applied *Moitie* in the expansive manner Petitioners seek. All four courts require a prior federal judgment, which is absent here. Moreover, all four examine the relationship between the prior claim in federal court and the state law claim and require a close relationship. In the Fifth, Seventh and Ninth Circuits, the federal-court claim must be sufficiently similar to the state law claim that the former bars

the latter under res judicata principles. In the Second Circuit, the federal and state claims must be virtually the same. In contrast, under Petitioners' approach, the state and federal court actions need only have a procedural issue in common, and the claims asserted in the two actions can be wholly different.

Any disagreement among the circuits about the meaning of *Moitie* relates to issues not pertinent here. Any such disagreement, therefore, provides no basis for this Court to review this case.

B. Petitioners' Interpretation Of The Federal Question Statute Does Not Merit Further Judicial Consideration Because It Is Contrary To Sound Judicial Policy.

The absence of judicial precedent for a collateral estoppel form of artful pleading is reason enough to deny the petition. But there is an additional reason. The substantial extension of the artful pleading doctrine Petitioners seek would produce anomalous and unsound results in violation of the rule that the federal question statute must be interpreted consistently with reason, coherence and sound judicial policy. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). Specifically, under Petitioners' interpretation of the statute:

- The presence or absence of federal question jurisdiction depends on *when* the plaintiff files suit in state court. If he files after the adverse federal ruling, he is deemed to be avoiding that ruling and his case is subject to the jurisdiction of the federal courts. If he commences his state court action before the federal ruling, no such inference can be made and federal question jurisdiction is absent. However, the timing of a lawsuit has no inherent relationship to whether it arises under federal law.

- The presence or absence of federal question jurisdiction depends on the *outcome* of the federal ruling. A ruling favorable to the state-court plaintiff obviously precludes an inference that he is attempting to avoid an adverse federal court ruling. The opposite result, however, permits that inference. There is no logical reason why the particular resolution of a federal issue in one case should determine the removability of another case.

- The existence of federal question jurisdiction could turn on the litigation strategy of the parties in the state case. For example, suppose the plaintiff in the federal case filed an unsuccessful motion in limine to exclude evidence important to the defendants' case. The plaintiff in the state case would create or not create federal question jurisdiction depending on whether he sought to exclude the same evidence. Or in this case, if Respondent were to drop his class action allegations, would his claim be any more or less federal?

- The defendant gets two bites at the preclusion apple. If the defendant persuades the federal court that the adverse federal ruling is collateral estoppel, the federal court will exercise jurisdiction and give the federal ruling preclusive effect. If the defendant fails to so persuade the district court, the case will be remanded to state court for lack of subject matter jurisdiction, the district court's determination that the federal ruling is not collateral estoppel will be a nullity, and the defendant will be able to raise the preclusion issue again in the state court.

- The scope of the doctrine becomes undefined, with no principled way to limit the number or types of federal issues that are sufficient to create federal jurisdiction

> over the state-law case. For example, can a federal decision on the most mundane discovery matter, such as a routine motion to compel, be sufficient to cause the state court action to arise under federal law?

These anomalies and difficulties demonstrate that Petitioners' artful pleading approach is not a sound interpretation of the federal question statute, and thus does not warrant this Court's review.

In addition, Petitioners' expansive interpretation of the artful pleading doctrine is at odds with this Court's "deeply felt and traditional reluctance" to read federal jurisdictional statutes broadly. *Romero*, 358 U.S. at 379.

> Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Healy v. Ratta, 292 U.S. 263, 270 (1934). For this reason, courts have avoided an expansive application of the artful pleading doctrine. "The artful pleading doctrine is to be invoked only in *exceptional circumstances* as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1427 (9th Cir. 1984) (emphasis added); *see United Jersey Banks v. Parell*, 783 F.2d 360, 368 (3d Cir.), *cert. denied*, 476 U.S. 1170 (1986).

As an unsound and substantial extension of the artful pleading doctrine, Petitioners' approach does not merit further judicial consideration.

C. Because Petitioners' Policy Arguments Are Irrelevant To A Proper Interpretation Of The Removal And Federal Question Statutes, They Furnish No Reason To Grant The Petition.

In support of their request that this Court consider a collateral estoppel version of artful pleading, Petitioners portray their doctrine as a tool for consolidating parallel state and federal litigation, with the purported benefit of promoting fairness and judicial economy and deterring forum shopping. However, this Court is not free to interpret the removal and federal question statutes to promote goals that are not embodied in the statutory language. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Petitioners point to no statutory language or case law suggesting that either statute was written to advance the goals identified by Petitioners. To the contrary, 28 U.S.C. § 1441 "simply does not address issues of judicial economy and litigation management — matters beyond the scope of the statute's language and policy." *Carpenter v. Wichita Falls Independent School Dist.*, 44 F.3d 362, 371 (5th Cir. 1995); *accord Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1377 (9th Cir. 1987) ("we are not free 'to implement policies, such as coordination with pending multidistrict litigation, which, though desirable, lie beyond the scope of the removal statute.' "), *cert. denied*, 484 U.S. 850.[1] Petitioners' policy arguments give this Court no reason to grant the petition.

In fact, the issue of whether a prior federal ruling should be protected has no relevance to the jurisdictional question in this

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1. What Petitioners are really complaining about is federalism generally, which permits concurrent, overlapping litigation in state and federal courts. *Carpenter*, 44 F.3d at 371 ("to complain of the costs arising out of concurrent litigation in separate jurisdictions is to complain generally of federalism, which suffers inefficiencies and multiplicity for its own sake").

case. The district court's class certification ruling in *Price* is entitled to the same protection, if any, whether this case goes forward in state or federal court. *Heck v. Humphrey*, 512 U.S. 477, 129 L. Ed. 2d 383, 395 n.9 (1994) ("State courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law."). Furthermore, Petitioners' policy concerns are fully accommodated by federal preclusion rules, which *were* developed to promote fairness, deter forum shopping and avoid inconsistent rulings. *Montana v. United States*, 440 U.S. 147, 153-54 (1979) ("to preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.").

In any event, Petitioners' policy arguments are not persuasive because they are based on an unwarranted mistrust of state courts. Petitioners' suggestion that all sorts of evils (such as forum shopping and relitigation of decided issues) will occur if this case and others like it are not litigated in federal court is unfair to the Alabama courts and their sister courts in other states. As this Court observed over 40 years ago:

> The assumption upon which the argument proceeds is that federal rights will not be adequately protected in state courts. . . . But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the

> procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 [the Anti-injunction Act] is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.

Amalgamated Clothing Workers v. Richman Brothers Co., 348 U.S. 511, 518 (1955). Accordingly, this Court presumes state courts to be competent to decide federal issues. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988).

In sum, Petitioners' policy arguments are irrelevant and unpersuasive and do not create a reviewable issue.

III.

PETITIONERS' ALTERNATIVE ARTFUL PLEADING ARGUMENT DOES NOT WARRANT SUPREME COURT REVIEW.

Petitioners also ask this Court to consider an alternative interpretation of *Moitie*'s footnote 2. Based on *Moitie*, Petitioners argue that Respondent's antitrust claim, though it was brought under state antitrust law, necessarily arises under federal antitrust law. According to Petitioners, conspiracies involving interstate commerce, such as the one alleged in this case, can be redressed only under federal antitrust law, not under Alabama antitrust law.

This approach to artful pleading, which would require removal courts to determine whether state law provides a cause of action, does not warrant this Court's review. No appellate court has interpreted *Moitie* in this way, and the district court

decisions on which Petitioners rely are inconsistent with this Court's artful pleading analysis and conflict with *California v. ARC America Corp.*, 490 U.S. 93 (1989). Moreover, Respondent has no federal antitrust claim to support federal question jurisdiction, and Petitioners' alternative construction of the federal question statute is not sound.

A. The Petition Should Be Denied Because No Appellate Court Has Accepted Petitioners' Alternative Interpretation of *Moitie*.

None of the four circuit courts to address the meaning of *Moitie*'s footnote 2 has interpreted it as Petitioners do for their alternative argument. In particular, the question of whether state law provides a cause of action for the conduct at issue is not an element of the artful pleading analysis of any of these courts. The absence of any appellate court support for Petitioners' alternative interpretation of *Moitie* strongly indicates that Supreme Court review is not warranted.

B. Because Petitioners Seek To Expand The Artful Pleading Doctrine Far Beyond The Limited Scope Recognized By This Court, The Petition Should Be Denied.

Petitioners' alternative argument should not be considered by this Court, moreover, because it is far removed from the artful pleading framework established by this Court. Consistent with the sparing use this Court has made of the artful pleading doctrine, the Court, in a post-*Moitie* decision, stated:

> Although "occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization, . . . most of them *correctly* confine this practice to areas of the law pre-empted by federal substantive law".

Caterpillar, Inc. v. Williams, 482 U.S. 386, 397 n.11 (1987) (emphasis added) (*quoting Moitie*, 452 U.S. at 410 n.6 (Brennan, J., dissenting)). *Caterpillar* states this Court's view that the artful pleading doctrine should be confined to situations where federal law completely preempts state law. It is undisputed that this is not a complete preemption case. *ARC America*, 490 U.S. at 101.

Even if *Moitie* is interpreted more broadly than warranted under *Caterpillar*, Petitioners' alternative argument would still represent a marked departure from this Court's artful pleading analysis. Under the artful pleading doctrine as applied by this Court, a state law claim may be converted into a federal claim because of the preemptive effect of a federal claim, *Caterpillar*, 482 U.S. at 393-94, or arguably because of the preclusive effect of a federal judgment, *Moitie*, 452 U.S. at 397 n.2. Thus, the essential elements of artful pleading under a generous view of this Court's decisions are: (1) the existence of a federal claim or federal judgment; and (2) the preemptive or preclusive effect of the federal claim or federal judgment on the artfully-pled state law claim. It is the force of the federal claim or federal judgment (through preemption or preclusion) that transforms the state law claim into a federal one. Here, however, Petitioners seek to convert Respondent's state antitrust claim into a federal claim because, in Petitioners' view, Respondent's claim is not valid under *state law*. Petitioners' approach is a far cry from this Court's artful pleading analysis and, accordingly, does not merit Supreme Court consideration.

C. The Petition Should Be Denied Because It Relies On District Court Cases That Conflict With *ARC America*.

The district court decisions on which Petitioners rely for their alternative argument conflict with *ARC America*. Petitioners' cases assert that anticompetitive activity involving interstate commerce is only actionable under the federal antitrust

laws. This conclusion rests on the premise that a neat dichotomy exists between the scope of state and federal antitrust laws. According to Petitioners' cases, federal antitrust law solely and exclusively governs interstate commerce, while state antitrust law solely and exclusively governs intrastate commerce. Contrary to the view of these cases, the respective spheres of state and federal antitrust law overlap, as this Court made clear in *ARC America*.

The plaintiffs in *ARC America* included both direct and indirect purchasers of cement in different states around the country who alleged a nationwide price-fixing conspiracy in violation of federal and state antitrust laws, including the Alabama antitrust statute. In holding that the federal antitrust laws do not preempt their state counterparts, this Court recognized that state antitrust laws impose liability "in addition to that imposed by federal law." 490 U.S. at 105. As a matter of logic, state and federal antitrust liability can be cumulative only if they arise from the same wrongdoing (*e.g.*, in *ARC America*, from the same nationwide conspiracy). Thus, *ARC America* recognized that state and federal antitrust laws are not mutually exclusive and that both can be applied to remedy the same nationwide conspiracy. Indeed, if federal and state antitrust laws operated in mutually exclusive spheres as Petitioners contend, the preemption issue addressed in *ARC America* could not have arisen. Because the premise of Petitioners' artful pleading cases, *e.g.*, *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79 (E.D.N.Y. 1980), conflicts with *ARC America*, Petitioners' cases furnish no reason for this Court to review this case.

D. The Petition Should Be Denied Because Respondent Has No Federal Antitrust Claim On Which To Base Federal Question Jurisdiction.

As an indirect purchaser of Petitioners' prescription drugs, Respondent is without a claim under the federal antitrust laws. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Thus,

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> [i]t would be incongruous . . . to construe these state law consumer class claims as arising under federal law when, under federal law as announced in *Illinois Brick*, it would appear that they never arose at all.

In re Sugar Antitrust Litig., 588 F.2d 1270, 1273 (9th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); *see Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 26 (1983) (holding that the State of California's claim did not arise under ERISA because, among other reasons, "ERISA does not provide an alternative cause of action in favor of the State to enforce its rights"). Petitioners are plainly wrong to assert that Respondent's claim arises under federal antitrust law. Because Petitioners' alternative artful pleading argument is fundamentally flawed for this reason, it does not present an important question for this Court's review.

E. Petitioners' Alternative Argument Is Not A Sound Interpretation Of The Federal Question Statute.

Like Petitioners' collateral estoppel version of artful pleading, their alternative version is not sound and, therefore, does not merit further judicial review. Under Petitioners' alternative theory:

- The presence or absence of removal jurisdiction depends on whether a parallel case is pending in federal court and the order in which the state and federal cases are filed. If the state case is the first or only one filed, federal question jurisdiction does not lie. If a parallel federal case is also filed and it is filed first, federal question jurisdiction exists. However, there is no logical reason to interpret 28 U.S.C. § 1331 to make federal court jurisdiction turn on the existence of parallel federal litigation or the sequence in which federal and state cases are commenced.

- Defendants get two chances to defeat the state law claim on the pleadings. Their first is in federal court in opposition to a remand motion. If unsuccessful there, their second chance is a motion to dismiss in state court after remand. This Court should not consider an approach that unfairly results in multiple opportunities to dismiss a state law claim on the pleadings.

- Removal courts, in determining whether federal question jurisdiction exists, must pass on the validity of the state law claim as a matter of state law. Thus, they must reach the merits of the case before they have ascertained whether they have jurisdiction. This they cannot do. *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action for which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.").

These difficulties inherent in Petitioners' alternative artful pleading argument provide an additional reason for this Court not to review this case.

CONCLUSION

The petition should be denied.

Respectfully submitted,

MICHAEL D. HAUSFELD
Counsel of Record
DANIEL A. SMALL
COHEN, MILSTEIN, HAUSFELD
& TOLL, P.L.L.C.
Attorneys for Respondent
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
(202) 408-4600

APPENDIX A — EXCERPTS FROM *RIVET* PETITION

No. 96-1971

In The

Supreme Court of the United States

October Term, 1996

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.,

Petitioners,

versus

REGIONS BANK, WALTER L. BROWN, JR., PERRY S. BROWN, and FOUNTAINBLEAU STORAGE ASSOCIATES,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

LINDA V. FARRER
Counsel of Record
Suite 401, The Realty Building
24 Drayton Street
Savannah, GA 31401
(912) 234-1118

Appendix A

JOHN GREGORY ODOM
STUART E. DES ROCHES
LADSON, ODOM & DES ROCHES, LLP

Attorneys for Petitioners
35th Floor, Place St. Charles
201 St. Charles Avenue
New Orleans, LA 70170-3500
(504) 522-0077

Appendix A

QUESTIONS PRESENTED

(1) Does this Court's holding in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981), permit removal of a state court controversy involving mortgage rights in real property, solely on the basis that the defendants intended to assert the affirmative defense of claim preclusion based on a prior federal judgment, where the Petitioners had not filed the prior federal action and had no conceivable claim which might have been brought in federal court?

(2) May a United States District Court reach a decision on the merits of a controversy prior to ascertaining whether federal jurisdiction over the controversy exists, and then use the decision on the merits to justify a decision to invoke jurisdiction over the controversy?

No. 97-775

FILED
JAN 9 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION

ABBOTT LABORATORIES, *et al.*,

Petitioners,

—v.—

ROBERT A. HUGGINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

GEOFFREY C. HAZARD, JR.
Of Counsel
Trustee Professor of Law
University of Pennsylvania
3400 Chestnut Street
Philadelphia, Pennsylvania 19104
(215) 898-7494

KENNETH R. LOGAN
Counsel of Record
SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

Attorneys for American Home Products Corporation and American Cyanamid Company

(*Additional Petitioners And Counsel Are Listed On The Signature Pages*)

13 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. THE VALIDITY OF COLLATERAL ESTOPPEL-BASED ARTFUL PLEADING MERITS THIS COURT'S REVIEW 1

1. Review Of This Case Will Enable The Court To Resolve Aspects Of The Artful Pleading Doctrine That Will Not Be Resolved By *Rivet* 1

2. Respondent Mischaracterizes Aspects Of Petitioners' Arguments 2

3. The Remand Statute Should Be Interpreted In Light Of The Policy Goals Of Fairness And Judicial Economy 4

B. PETITIONERS' POSITION IS CONSISTENT WITH *ARC AMERICA* 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases	PAGE(s)
Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968)	6
Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc)	5
California v. ARC America Corp., 490 U.S. 93 (1989)	5, 6
Deauville Assoc., Inc. v. Lojoy Corp., 181 F.2d 5 (5th Cir.), *cert. denied*, 340 U.S. 905 (1950)	4, 5
Doe v. Allied-Signal, Inc., 985 F.2d 908 (7th Cir. 1993)	5
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	2, 6
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	6
In re Wiring Devices Antitrust Litig., 498 F. Supp. 79 (E.D.N.Y. 1980)	6
Rivet v. Regions Bank of Louisiana, F.S.B., 108 F.3d 576 (5th Cir.), *cert. granted* __ U.S. __, 118 S. Ct. 31 (1997)	1, 5
Sullivan v. First Affiliated Secur., Inc., 813 F.2d 1368 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987)	5
Travelers Indemnity Co. v. Sarkisian, 794 F.2d 754 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986)	5
Villareal v. Brown Express, Inc., 529 F.2d 1219 (5th Cir. 1976)	5

Statute

28 U.S.C. § 1441	3

ARGUMENT[1]

A. THE VALIDITY OF COLLATERAL ESTOPPEL-BASED ARTFUL PLEADING MERITS THIS COURT'S REVIEW

1. Review Of This Case Will Enable The Court To Resolve Aspects Of The Artful Pleading Doctrine That Will Not Be Resolved By *Rivet*

Respondent contends that certiorari should be denied because the conflict among the circuits over the scope of the artful pleading doctrine has not focused on the precise question of whether collateral estoppel can form the foundation for removal based on artful pleading. Respondent misses the point. This Court granted certiorari in *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576 (5th Cir.), *cert. granted* __ U.S. __, 118 S. Ct. 31 (1997) to clarify the scope of the artful pleading doctrine. For the same reason, this Court should also review this complementary case. While disposition of *Rivet* is clearly relevant to a proper analysis of this case, it will not necessarily resolve the issues that are at the core of this case, as even the Respondent acknowledges. Respondent's Brief ("Resp. Br.") at 5. Having granted certiorari in *Rivet* to clarify the scope of the artful pleading doctrine, this Court should take the opportunity to address the related and important issue of federal law squarely presented here—whether federal courts are empowered to protect their jurisdiction by allowing removal of a follow-on action filed in state court where, as here, a central issue raised in the complaint was preclusively decided against the plaintiff in a virtually identical prior federal action.[2]

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[1] A complete Rule 29.6 Statement is included in the Petition for a Writ of Certiorari, dated November 3, 1997.

[2] Respondent points to the Petitioners' failure to raise federal question jurisdiction when removing *Price v. American Home Products, et al.*, 94 C 897 (N.D. Ill.) as making the questions presented here unworthy of this

This issue can confront parties in a multitude of circumstances. In many areas of law, our federal system affords plaintiffs the option of seeking redress under federal law or state law (or both) against the exact same conduct. That this is so in the antitrust area is evidenced by the fact that more than 150 federal law cases and more than 15 state law cases have been filed in various courts around the country over the past four-and-a-half years containing essentially the same allegations presented in the *Huggins* complaint. More than 150 of these cases have been transferred, along with *Price* and *Huggins*, to the district court of the Northern District of Illinois for consolidated pre-trial treatment. Litigation in the securities, employment discrimination and products liability fields are similarly characterized by concurrent federal and state actions.

In all of these areas, class (or shareholder) actions are common, giving plaintiffs the opportunity to refile in a state court whenever a federal court denies class certification. In the absence of removal jurisdiction to prevent a plaintiff from so circumventing a binding prior federal court ruling, defendants can be forced to return to state court to relitigate issues already decided in their favor, or argue the preclusive effect of the federal court's ruling. Such manipulation of our federal system by plaintiffs should not be tolerated. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), teaches that it is not.

2. Respondent Mischaracterizes Aspects Of Petitioners' Arguments

Respondent complains of the "anomalous and unsound results" of collateral estoppel-based artful pleading. Resp. Br. at 11. But none of Respondent's charges can withstand

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Court's review. Resp. Br. at 3. Respondent neglects to add, however, that there was no prior federal court ruling to avoid when *Price* was removed. Instead, it was the ruling in *Price* itself that the Respondent sought to avoid by filing the *Huggins* action.

scrutiny. First, Respondent complains that allowing removal where, as here, Respondent's state court complaint constitutes an attempt to evade a preclusive federal court ruling would mean that the presence or absence of federal jurisdiction would depend on the timing of a plaintiff's suit in state court (before or after the preclusive adverse ruling) and on the outcome in federal court. This contention, however, is in no way unique to removal based on a plaintiff's attempted circumvention of a binding issue, as opposed to a binding claim. Even under the widely accepted res judicata-based artful pleading doctrine, to which Respondent raises no objection, an action may be removed only after the prior federal claim reaches a final judgment. That is, removal of the state action would depend on both the timing and the outcome of the federal action.

Second, Respondent expresses the related concern that a plaintiff in a state case "would create or not create federal question jurisdiction" depending on whether he sought to file the same motion rejected in the prior federal court action. Resp. Br. at 12. This dilemma is a fiction. Nowhere do Petitioners suggest that jurisdiction should attach midway through a state action depending on motions filed by the plaintiffs and their relation to issues decided in a federal court proceeding. Jurisdiction for removal purposes, as with original jurisdiction, is determined on the basis of the content of the complaint (and any amendments to the complaint). 28 U.S.C. § 1441. In this case, it is clear from the face of the complaint that the plaintiffs seek class treatment (indeed, they sought and obtained *ex parte* conditional certification before they even served the complaint on defendants). That is, they are seeking to relitigate an issue that had previously been decided against them by a federal court in a virtually identical case.

Finally, Respondent imagines that recognition of collateral estoppel-based artful pleading will open the floodgates for removal of state cases that raise issues, however small, that were preclusively decided by a prior federal court ruling.

Resp. Br. at 13. Yet the example the Respondent provides highlights that this concern too is without foundation. Respondent questions whether an issue related to a "mundane discovery matter" could form the basis for removal based on collateral estoppel-based artful pleading. But any conflict with a prior discovery order would arise out of a discovery *motion* filed by the plaintiffs in the state case, and *not* from the face of the complaint.

Furthermore, to the extent that a complaint does itself evidence an attempt by the plaintiffs to relitigate issues that have been necessarily and finally decided against them in a federal court, we have no doubt that in applying this variation of the artful pleading doctrine, courts would be able to distinguish between minor issues and ones that, as here, lie at the heart of a plaintiff's complaint. After all, the purpose of the artful pleading doctrine, whether based on claim preclusion or issue preclusion, is to deny plaintiffs the opportunity to avoid a binding prior federal court ruling by refiling a case in state court. If the issue previously decided against the plaintiff were minor, the plaintiff would not likely refile in state court in an effort to avoid it.

3. The Remand Statute Should Be Interpreted In Light Of The Policy Goals Of Fairness And Judicial Economy

In response to Petitioners' argument that removal based on collateral estoppel and the artful pleading doctrine promotes fairness and judicial economy, Respondent claims that those policy justifications are outside the scope of the removal statute. Resp. Br. at 14-16. Yet those same justifications support the res judicata-based artful pleading doctrine, which has been the basis for removal of cases dating back to 1950, *see Deauville Assoc., Inc. v. Lojoy Corp.*, 181 F.2d 5, 6 (5th Cir.), *cert. denied*, 340 U.S. 905 (1950), and has now been recognized by the Second, Fifth, Seventh, Ninth and Eleventh Cir-

cuits.[3] Congress has amended the removal statute five times since the 1970s without once curtailing the practice or even expressing any concern that the artful pleading doctrine was not properly grounded in the removal statute.

B. PETITIONERS' POSITION IS CONSISTENT WITH *ARC AMERICA*

Respondent raises *California v. ARC America Corp.*, 490 U.S. 93 (1989) as a shield against Petitioners' alternate artful pleading argument, claiming that Petitioners seek to prevent the application of state antitrust laws to any conduct involving interstate activity. Resp. Br. at 18-19. Again Respondent misses the mark. *ARC America* held only that state antitrust laws are not preempted by federal antitrust laws. Petitioners have never argued to the contrary.

Respondent's allegation rests on a misstatement of the Petitioners' argument. Quoting the Seventh Circuit, which had also fundamentally misunderstood the argument, the Respondent characterized the Petitioners as arguing that:

> *any* time an antitrust plaintiff brings a suit in state court under a state antitrust statute that contains substantive provisions similar to that of a federal antitrust statute, the defendant can remove on the ground that the plaintiff is trying to bring a federal antitrust suit yet to insulate it from removal to a federal court.

Resp. Br. at 6-7 (emphasis in original).

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[3] *See Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986); *Rivet*, 108 F.3d 576; *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911-12 (7th Cir. 1993); *Sullivan v. First Affiliated Secur., Inc.*, 813 F.2d 1368 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). By incorporating Fifth Circuit precedent, including *Deauville Associates* and *Villareal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976), the Eleventh Circuit also recognizes the res judicata-based artful pleading doctrine. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Petitioners have never made such an argument. Rather, Petitioners' argument is confined to instances where the states themselves—through laws enacted by their legislatures and interpreted by their courts—decided to limit the applicability of their antitrust laws to activity that was fundamentally intrastate in nature. Under these circumstances, an allegation of a nationwide price-fixing conspiracy in an industry that transacts business daily in every state would be outside the reach of the laws of those states. Thus, contrary to the Respondent's charge, the Petitioners make a much more limited argument: removal jurisdiction should attach where a plaintiff's state court complaint alleges facts that mimic those in multiple pending federal cases but where such facts make out no cognizable claim under state law. As correctly stated, Petitioners' alternative artful-pleading argument in no way contravenes this Court's holding in *ARC America*.

As discussed in the Petitioners' Opening Brief (Br. at 19-23), it is precisely when a state court complaint, as here, lacks any cognizable state law claim and mimics the factual allegations in a federal court action that courts have held that the claims alleged have a sufficient federal character to support removal on federal question jurisdiction grounds.[4] *See Moitie*, 452 U.S. at 397 n.2 (citing two such cases with approval).

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[4] Respondent's assertion that the damages aspect of his federal claim is barred by this Court's holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), is irrelevant. The Respondent's status as an indirect purchaser does not divest a federal court of jurisdiction over the matter. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560-61 (1968) (state law complaint involving preempted field of labor law was properly removed even though federal law offered no relief). It merely provides Petitioners with an affirmative defense to the merits of his claim. Indeed, in one of the cases cited by the Court in *Moitie* as sufficiently federal to warrant removal, the indirect purchaser plaintiffs were similarly barred from recovering under federal antitrust law by *Illinois Brick*. *Moitie*, 452 U.S. at 398, n.2 (citing *In re Wiring Devices Antitrust Litig.*, 498 F. Supp. 79, 85-87 (E.D.N.Y. 1980)).

CONCLUSION

For the foregoing reasons and for the reasons stated more fully in the Petitioners' Opening Brief, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

GEOFFREY C. HAZARD, JR.
Of Counsel
Trustee Professor of Law
University of Pennsylvania
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-7494

KENNETH R. LOGAN
Counsel of Record
Joseph F. Tringali
Jonathan K. Youngwood
Simpson Thacher & Bartlett
(a partnership which includes professional corporations)
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

Joel G. Chefitz
Stephen D. Libowsky
Katten, Muchin & Zavis
(a partnership which includes professional corporations)
Suite 1600
525 W. Monroe Street
Chicago, Illinois 60661
(312) 902-5200

Attorneys for American Home Products Corporation and American Cyanamid Company

J. Andrew Langan
Kirkland & Ellis
200 E. Randolph Drive
Chicago, Il. 60601
(312) 861-2064

Attorneys for Abbott Laboratories

Douglas D. Broadwater
Stephen S. Madsen
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, N.Y. 10019
(212) 474-1553

Thomas P. Sullivan
Richard T. Franch
Jenner & Block
One IBM Plaza
Chicago, Il. 60611
(312) 222-9350

Attorneys for Bristol-Myers Squibb Co.

Thomas F. Curnin
Cahill Gordon & Reindel
Eighty Pine Street
New York, N.Y. 10005
(212) 701-3609

Attorneys for Buroughs Wellcome Co.

Brian L. Sullivan
Paul Dennis Connuck
Whitman Breed Abbott & Morgan
200 Park Avenue
New York, N.Y. 10166
(212) 351-3000

Attorneys for Carter-Wallace, Inc.

Saul P. Morgenstern
Ricardo J. Hollingsworth
Dewey Ballantine
1301 Avenue of the Americas
New York, N.Y. 10019-6902
(212) 259-8000

Attorneys for Ciba-Geigy Corporation

Robert K. Stanley
Baker & Daniels
300 N. Meridian Street – #2700
Indianapolis, In. 46204
(317) 237-1254

Attorneys for Eli Lilly and Company

Herschel S. Weinstein
Dornbush Mensch Mandelstam & Schaeffer
747 Third Avenue – 11th Floor
New York, N.Y. 10017
(212) 759-3300

Attorneys for Forest Laboratories, Inc.

Jerome I. Chapman
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

Attorneys for Glaxo Inc.

David E. Everson
Stinson, Mag & Fizzell
1201 Walnut Street – #2800
Kansas City, Mo. 64106
(816) 842-8600

Attorneys for Marion Merrell Dow Inc.

Kenneth M. Kramer
Shearman & Sterling
Citicorp Center
153 E. 53rd Street
New York, N.Y. 10022
(212) 848-4172

Attorneys for Merck & Co., Inc.

William F. Cavanaugh, Jr.
Patterson, Belknap, Webb & Tyler
1133 Avenue of the Americas
New York, N.Y. 10036-6710
(212) 336-2793

Attorneys for Ortho Pharmaceuticals Corp.

David Klingsberg
Michael Malina
David Copeland
Kaye, Scholer, Fierman, Hays & Handler, LLP
425 Park Avenue
New York, N.Y. 10022
(212) 836-8281

Attorneys for Pfizer Inc.

Mary B. Cranston
Pillsbury, Madison & Sutro
225 Bush Street
P.O. Box 7880
San Francisco, Ca. 94120
(415) 983-1621

Attorneys for Rhone-Poulenc Rorer, Inc.

Robert H. Rawson, Jr.
Thomas Demitrack
Jones, Day, Reavis & Pogue
North Point
901 Lakeside Avenue
Cleveland, Oh. 44114
(216) 586-7216

Attorneys for Sandoz Pharmaceutical Corporation

John W. Nields, Jr.
Marguerite S. Boyd
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402
(202) 383-6639

Michael M. Conway
Hopkins & Sutter
Three First National Plaza
Chicago, IL 60602-4205

Attorneys for Schering-Plough Corporation

John Treece
Sidley & Austin
One First National Plaza
Chicago, Il. 60603-2279
(312) 853-7427

Attorneys for G.D. Searle & Co.

Arthur Makadon
Ballard Spahr Andrews & Ingersoll
1735 Market Street – 51st Floor
Philadelphia, Pa. 19103-7599
(215) 662-5520

Attorneys for SmithKline Beecham Pharmaceuticals Corporation

Larry J. Saylor
Miller, Canfield, Pakkock & Stone
150 W. Jefferson – #2500
Detroit, MI 48226
(313) 496-7686

Attorneys for The Upjohn Company

Herbert Dym
David L. Meyer
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566

Attorneys for Warner-Lambert Company

Arthur F. Golden
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
(212) 450-4388

Attorneys for Zeneca Inc.